88-1595

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No. 88-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, JR. and BARBARA K. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard P. McElroy
Counsel of Record
Ann B. Laupheimer

BLANK, ROME, COMISKY & MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

Attorneys for Petitioners

Of Counsel:
David L. Perry
Stephen B. Ringwood
Kaiser Aluminum & Chemical Corporation
300 Lakeside Drive
Oakland, CA 94643
(415) 271-5610

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PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED

In this private antitrust case, which was commenced in 1974, respondents ultimately secured a judgment of $9,567,939 after several retrials and intervening appellate proceedings. After payment of the judgment, respondents claimed interest on the judgment under 28 U.S.C. § 1961, as amended in 1982. The 1982 amendment substituted for the various state court interest rates a uniform federal rate of interest on judgments keyed to United States Treasury bill auction prices. This case presents the following important questions involving the application of this provision and broader issues of retroactive application of federal statutes which have sharply divided the circuits:

1. Whether, as the Third and Eighth Circuits have held, the 1982 amendment to 28 U.S.C. § 1961 applies retroactively to judgments entered prior to its effective date, or whether it should be applied only to judgments entered after its effective date, as the Second, Fourth, Fifth and Seventh Circuits have held?

2. Whether the Court below erred in using the "*Bradley* presumption" in favor of retroactively applying current law to a pending case, notwithstanding controlling authorities of this Court, recently reaffirmed in *Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (Dec. 12, 1988), holding that an unqualified, contrary presumption exists that legislation applies prospectively only in the absence of clear and unequivocal statutory language or legislative history to the contrary?

3. Whether 28 U.S.C. § 1961, which provides that interest shall be calculated from the "date of entry of the *judgment*", may be construed to require the calculation of interest from the date of *verdict*?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

This statement is submitted pursuant to Rule 28.1 of the Rules of the Supreme Court. Until it was merged into Petitioner Kaiser Aluminum & Chemical Corporation, Petitioner Kaiser Aluminum & Chemical Sales, Inc., was a wholly-owned subsidiary of Petitioner, Kaiser Aluminum & Chemical Corporation. As of March 27, 1989, Kaiser Aluminum & Chemical Corporation had the following parent companies:

Kaiser Aluminum & Chemical Corporation
Owned by: KaiserTech Limited [44,898,914 shares]
Brown Brothers Harriman, Inc. [406 shares]

KaiserTech Limited
Owned by KLU Holdings, Inc.

KLU Holdings, Inc.
Owned by MPI Investments, Inc.

MPI Investments, Inc.
Owned by MAXXAM Properties Inc.

MAXXAM Properties Inc.
Owned by MAXXAM Group Inc.

MAXXAM Group Inc.
Owned by MAXXAM Inc.

As of March 27, 1989, Kaiser Aluminum & Chemical Corporation had the following subsidiaries (excluding wholly-owned subsidiaries):

DOMESTIC
Alpart Farms (Jamaica) Ltd.
Alpart Jamaica Inc.
Alumina Partners of Jamaica
Filtrol Corporation
Jamaica Alumina Security Company, Ltd.
Kaiser Center Properties

Kaiser Center Properties, Inc.
Kaiser Delaware, Inc.
Oakland City Center Hotel Company, Inc.
Queensland Alumina Security Corporation
Second Queensland Alumina Security Corporation

FOREIGN
Aluminium Bahrain
Aluminium Products Company Limited
Anglesey Aluminium Limited
Boyne Smelters Limited
Hopewell International Insurance Ltd.
Kaiser Jamaica Bauxite Company
Queensland Alumina Finance N.V.
Queensland Alumina Holdings N.V.
Queensland Alumina Limited
Societe D'Etudes des Bauxites du Cameroun
Thai Metal Works Company, Ltd.
Tortuga Casualty Company
United Insurance Company
Volta Aluminium Company Limited

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OCTOBER TERM, 1988

KAISER ALUMINUM & CHEMICAL CORPORATION and
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Petitioners,

v.

JOSEPH A. BONJORNO, GEORGE M. KERR, JR.
and BARBARA K. CLISBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser"), pray that a writ of certiorari issue to review the Opinion and Judgment of the Court of Appeals for the Third Circuit rendered on January 9, 1989, awarding respondents postjudgment interest on the judgment obtained in this private antitrust case.

Despite Congress' intent to establish uniformity, the courts of appeals currently award postjudgment interest according to widely divergent standards. The decision of the Third Circuit in this case contributes to the lack of consistency in this area. First, the holding of the Court below that the 1982 amendment to the federal postjudgment interest statute, 28 U.S.C. § 1961, applies retroactively to judgments entered prior to the statute's effective date sharpens the direct conflict among the circuit courts of appeals on this issue. The Court's decision,

which was based on application of a "presumption" in favor of retroactivity, is also illustrative of an even more fundamental confusion among lower courts concerning whether retroactivity is *ever* appropriate in the absence of clear and unequivocal statutory language or legislative history. In addition, the decision of the Court below that postjudgment interest must be calculated from the date of a jury damage *verdict,* rather than from the date of *judgment,* intensifies the conflict among the circuits on the issue of the date from which interest should be calculated.

Review of the decision of the Third Circuit is plainly warranted, as the present multiplicity of approaches among the courts of appeals on the calculation of postjudgment interest frustrates and impedes Congress' intent to establish uniformity in this area. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21.

OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to this Petition at A-1.[1] The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out in the Appendix to this Petition at A-3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out in the Appendix to this Petition at A-29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out in the Appendix to this Petition at A-31.

JURISDICTION

The judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989.

1. References to the Appendix are cited herein as "A-——".

A-1. Kaiser's timely petition for rehearing and suggestion of rehearing *in banc* was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* A-29-30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The petition is timely under 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court.

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1961 as it read prior to October 1, 1982 and amended 28 U.S.C. § 1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. § 1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by

the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

A. Prior Trials And Prior Appeals On The Merits

Columbia Metal Culvert Co., Inc. filed its Complaint in this case in 1974, charging Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") with violations of Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. § 14, and Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), as amended by the Robinson-Patman Act. The district court had subject matter jurisdiction over the substantive claim below pursuant to 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331, 1337. Joseph A. Bonjorno, George M. Kerr, Jr., and Barbara K. Clisby ("respondents") were later substituted as plaintiffs when Columbia Metal Culvert Co., Inc. ceased operations.

Respondents tried their claims to a jury beginning in April, 1977. At the conclusion of respondents' case, the district court granted motions for a directed verdict in Kaiser's favor on all counts of the Complaint and entered judgment accordingly. The Court of Appeals reversed and remanded the case for trial. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir. 1978), *cert. denied,* 439 U.S. 876 (1978). The case was tried on remand in July, 1979 before the district court and a jury. On August 16, 1979, the jury returned a verdict for respondents on liability. A

few days later, the same jury awarded damages in the amount of $1,815,000.00. The district court trebled the verdict, and on August 22, 1979 entered a judgment in the amount of $5,445,000.00. Nearly two years later, the district court, by Memorandum and Order dated June 18, 1981, granted Kaiser's judgment n.o.v. motion, in part, with respect to a portion of the respondents' damage claim. In addition, the district court granted Kaiser's motion for a new trial, but only as to damages. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981).

The new trial, limited to the issue of damages, was held in 1981. The jury returned a single damage verdict of $3,189,313.00 on December 2, 1981 and, two days later, the district court entered judgment in the trebled amount of $9,567,939 on December 4, 1981. One year later, on January 17, 1983, the court granted Kaiser's motion for judgment n.o.v. as to a part of the damage award, vacated the December 4, 1981 judgment and entered judgment on January 18, 1983, in the trebled damage amount of $4,651,560. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983).

Respondents appealed from the part of the judgment granting defendants' motion for judgment n.o.v. on damages and Kaiser cross-appealed the liability issues. By Opinion dated December 27, 1984, the Court of Appeals for the Third Circuit reversed the district court's partial grant of judgment n.o.v., affirmed liability and ordered that the January 18, 1983 judgment be vacated and the December 4, 1981 judgment in the amount of $9,567,939 be reinstated. *See Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *cert. denied,* 477 U.S. 908 (1986).

On July 1, 1986, the district court entered judgment on remand and on July 3, 1986, Kaiser paid the judgment.

B. The Decision Of The District Court Concerning Post-judgment Interest.

On April 11, 1988, the district court awarded $2,632,886.30 in postjudgment interest to respondents. Applying the standard set forth by this Court in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974), the district court declined to apply the 1982 amendment to 28 U.S.C. § 1961 retroactively to a judgment entered prior to its effective date and, instead, applied that statute as it was in effect on December 2, 1981.

In addition, the district court rejected both parties' positions with respect to the date from which postjudgment interest should run, holding that interest ran from December 2, 1981, the date of the damage *verdict* underlying the December 4, 1981 judgment.

C. The Decision Of The Court Below Concerning Post-judgment Interest.

On the question of retroactivity, a divided panel of the Court of Appeals, in an Opinion authored by Circuit Judge Cowen, applying *Bradley,* reversed the district court's holding that the language of amended § 1961 and its legislative history indicated that it should apply only to judgments entered after its effective date. The Court of Appeals also reversed the finding of the district court that retroactive application of amended § 1961 would result in manifest injustice to Kaiser. The Court of Appeals focused on respondents' rights, rather than on Kaiser's rights, stating that respondents' "right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits." A-22.

Circuit Judge Stapleton dissented, explaining that he would confine the application of amended § 1961 to judgments entered after its effective date, relying on *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984). Judge Stapleton found significant evidence that Congress did not intend the amendment to be applied to judgments entered before its effective date. He said: "Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment." A-27. Additionally, from the fact that Congress postponed for six months the effectiveness of this statute, Judge Stapleton deduced that "Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates." A-27.

The Court affirmed the portion of the district court's decision which held that postjudgment interest should be calculated from the December 2, 1981 damage *verdict,* rather than from the date of *"judgment",* as the statute provides. Notwithstanding the fact that the "delay" between verdict and judgment was only two days, the Court held that the district court "correctly revised its decision to conform with *Poleto,* 826 F.2d at 1280, stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment." A-14. The effect of this holding is to read the word "judgment" completely out of the statute and to *require* interest in all cases to run from the date of a damage verdict rather than entry of judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD SETTLE A CRITICAL QUESTION OF STATUTORY CONSTRUCTION OF 28 U.S.C. § 1961, ON WHICH THE CIRCUITS ARE IN CONFLICT, DEALING WITH CALCULATION OF INTEREST ON JUDGMENTS.

Prior to 1982, 28 U.S.C. § 1961, the statute which governed the calculation of postjudgment interest on judgments recovered in federal district courts, provided in relevant part that:

> interest shall be calculated from the date of the entry of the judgment, *at the rate allowed by State law.*

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982, which amended § 1961. Pub. L. No. 97-164, § 302, 96 Stat. 25, 55-56 (1982). One of Congress' goals in enacting the statute was to promote national "uniformity" in the calculation of postjudgment interest in federal court. The amendment, which Congress specifically provided *would not take effect* until October 1, 1982, changed the federal postjudgment interest rate to a uniform rate "equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment" (hereinafter the "T-bill rate").

The statute does not explicitly state whether the new method for calculating interest applies to judgments entered prior to its effective date.

A. The Court Of Appeals' Analysis Conflicts With This Court's Decision In *Bradley* And Conflicts With The Law Of Other Circuits.

The majority of the panel in the Court below, purporting to apply the analysis prescribed by this Court

in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), held that the amended version of § 1961 applied to the calculation of interest on judgments entered prior to the statute's effective date.

In *Bradley*, this Court relied "on the principle that a court is to apply the law in effect at the time it renders its decision", unless doing so would (1) result in manifest injustice; or (2) there is statutory direction to the contrary; or (3) there is legislative history to the contrary. 416 U.S. at 711.

The Third Circuit's holding that the *Bradley* standard justifies retroactive application of amended § 1961 directly conflicts with the decisions of the Second, Fourth, Fifth and Seventh Circuits, all of which have held that the amendments to §1961 should apply *prospectively only*, i.e., to judgments entered *after* its effective date. *See Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985) (concluding that legislative history and statutory language indicated nonretroactive effect and finding that the opposite conclusion would adversely affect the reliance interests of the litigants); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984) (holding that all three *Bradley* exceptions applied); *United States v. Dollar Rent A Car Svs.*, 712 F.2d 938, 940 (4th Cir. 1983) (holding that amendment did not apply to judgments entered prior to its effective date because there was "no indication that the statute was intended to have retroactive effect"); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943 (7th Cir. 1984). Both the Fifth Circuit in *Brooks* and the Second Circuit in *Litton* followed the *Bradley* analysis in reaching that conclusion.

The Third Circuit's holding also conflicts with the approach taken by divided panels of the Sixth and Ninth Circuits, which apply the rate prescribed by the pre-amendment version of §1961 to interest accruing prior to the effective date of the amendment and the T-bill rate, calculated as of the date of the pre-amendment

judgment, thereafter. *See Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987); *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988) (White, J.) (dissenting from denial of certiorari). The majority decisions in *Bailey* and *Campbell* were accompanied by vigorous dissents. As in this case, the dissenting judges would have applied amended §1961 only to judgments entered *after* its effective date. *Campbell*, 809 F.2d at 577-79; *Bailey* 838 F.2d at 156-57.

Only the Eighth Circuit has adopted the approach taken by the Third Circuit in this case. *See R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983).[2]

A review of the reasoning in these circuit court opinions dramatically illustrates the extent of the confusion and uncertainty relating to calculation of postjudgment interest under §1961. The Third Circuit in this case addressed each of the three *Bradley* exceptions, and held that *not one* exception applied. On virtually identical facts, the Second Circuit in *Litton,* also a private antitrust case, found that *all three* exceptions applied.

Specifically, the Second Circuit found that the language of the amended statute, which ties the applicable T-bill rate to the date of entry of the judgment, indicates that it should not apply to judgments entered before its effective date. *See Litton*, 746 F.2d at 174.[3] The Court below followed the Ninth Circuit majority in *Campbell*,

2. The Court below noted the conflict among the circuits, stating: "The various courts of appeals have disagreed over whether to apply the federal method of determining interest to judgments entered before October 1, 1982." A-15.

3. This opinion was shared by the Fifth Circuit and the dissenting circuit judges in the Third, Ninth and Sixth Circuits. *Brooks*, 757 F.2d at 742; *Campbell*, 809 F.2d at 578 (dissenting opinion of Wiggins, J.); *Bailey*, 838 F.2d at 156-57 (dissenting opinion of Krupansky, J.); *Bonjorno*, A-27.

which found that the language of the statute "does not shed any light" on the issue. 809 F.2d at 572.

With respect to legislative intent, the Fifth Circuit and the Ninth Circuit, and the dissenting circuit judges in the Third and Sixth Circuits all found an indication of nonretroactivity from the fact that Congress postponed the effective date of the statute. *See Campbell*, 809 F.2d at 573-74; *Brooks*, 757 F.2d at 742; *Bailey*, 838 F.2d at 156; *Bonjorno*, A-26-27. *See also Carl Marks & Co., Inc. v. USSR*, 665 F. Supp. 323, 336 (S.D.N.Y. 1987). The majority of the Court below in this case came to the opposite conclusion, finding Congress' deliberate postponement of the effective date too "ambiguous" to warrant displacing the *Bradley* presumption. *See* A-19.

Finally, the circuits which have addressed "manifest injustice" in this context are sharply divided on what a litigant must establish to fit within this exception. *Bradley* set forth three elements to evaluate whether manifest injustice would result from retroactive application of a statute: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change of the law upon those rights. 416 U.S. at 717.

With respect to the first element, the nature and identity of the parties, this Court's decisions in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and *Bradley* hold that when a case involves private parties, or the case does not involve issues of "great national concern", manifest injustice is more likely and retroactive effect should be rejected. *Schooner Peggy*, 5 U.S. (1 Cranch) at 110; *Bradley*, 416 U.S. at 718-19. In *Litton* and in this case, the plaintiffs argued that because they were acting as "private attorneys general" in enforcing the antitrust laws, their claim for postjudgment interest involved an issue of "great national concern" and could not be considered simply a lawsuit between private parties. The Second Circuit in

Litton rejected this argument, holding that "[w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest." 746 F.2d at 175.

The Third Circuit in this case held *precisely the opposite*, that, because a civil antitrust plaintiff assumes the role of a private attorney general, "an action to increase the rate at which postjudgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interest." A-22.

The Third Circuit's approach to the question of the nature of the rights involved and the impact of the change in §1961 on those rights conflicts with that of the Second and Fifth Circuits, as well. The Second Circuit in *Litton* and the Fifth Circuit in *Brooks* held that application of the new interest rate to a judgment entered prior to its effective date would affect the defendant's right to rely on interest running at the state law rate. *Brooks*, 757 F.2d at 743; *Litton*, 746 F.2d at 175-76. The Third Circuit here, faced with identical facts, held that until a final appellate judgment on the merits, no "mature and unconditional" rights exist and, accordingly, no manifest injustice can occur. A-22.

The inconsistency among the circuit courts of appeals is compounded by the fact that the Administrative Office of the United States Courts, the body charged by Congress with the responsibility for administering §1961, has also taken a position on this question. In a July 27, 1988 Memorandum To All Federal Judges, Magistrates, Court Executives, and Court Clerks, the Administrative Office adopted the position that the 1982 amendment to § 1961 *should not be applied retroactively*, stating:

> It is our view that the new rate will apply only to judgments entered on or after [the effective date]. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

A-57.

The conflict among the circuit courts concerning whether amended §1961 applies to the calculation of interest on judgments entered prior to October 1, 1982 has serious implications nationwide. In the United States District Court for the Eastern District of Pennsylvania *alone*, there are approximately 6110 judgments dated prior to October 1, 1982, which have not been marked "satisfied." Those judgments, totalling approximately $482,758,000, will all potentially be affected by the decision of the Court below.[4] According to the most recent Annual Report of the Administrative Office of the United States Courts, the caseload of the Eastern District of Pennsylvania represents only 3.4 percent of the total caseload in all district courts in the United States. Obviously, therefore, tens of thousands of unsatisfied judgments remain in the districts throughout the nation from prior to October 1, 1982, each potentially affected by resolution of the retroactivity question by this Court. Moreover, the issue is ripe for determination by this Court now that eight of the circuit courts have already grappled with the question and have reached sharply contrasting results.

This court should grant certiorari to resolve the serious conflict among the circuits regarding the applicable rate of postjudgment interest on judgments entered prior to October 1, 1982.

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4. Prior to the decision of the Court of Appeals in this case, it was the understanding of the Clerk of the District Court for the Eastern District of Pennsylvania that the T-bill rates prescribed in amended § 1961 only applied to *judgments entered after October 1, 1982. See* Table of T-bill rates maintained by the clerk of the United States District Court for The Eastern District of Pennsylvania. A-59.

B. The Court of Appeals Applied the Incorrect Presumption That Legislation Should Apply Retroactively to a Case Before it.

The conflict in the circuit courts is symptomatic of a more fundamental split of authority regarding retroactive construction of legislation that goes beyond this particular postjudgment interest statute. The law of presumptions for and against retroactive application of federal statutes is in chaos and the most recent pronouncement from this Court indicates that the "*Bradley* presumption" is no longer viable and should not have been followed by the Court below. *See Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (1988).

In this case, the Third Circuit chose to rely on the "*Bradley* presumption", which it defined as a presumption in favor of applying the "law in effect at the time [a court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." A-16. The court noted, however, that, "at first glance", the *Bradley* presumption "seems inconsistent" with the "long-standing rule of statutory construction that statutes are presumed to have only 'prospective' effect and will be given 'retroactive' effect only if there is affirmative legislative direction to do so." A-17. In noting the inconsistency in this Court's decisions, the Court below was correct.

1. The Decisions Of This Court Are Not Clear.

The "*Bradley*" presumption and the presumption *against* retroactive application of statutes, as enunciated by this Court, present more than a "seeming inconsistency". The Court's decisions appear to be in serious conflict.

The bias *against* retroactive laws "is an ancient one", dating back to the time of the Greek city-states. *See* Smead, *The Rule Against Retroactive Legislation: A*

Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 776 (1936) (cited with approval in Justice Scalia's concurrence in *Georgetown University Hosp. v. Bowen*, 109 S Ct. 468, 479 (1988)). Indeed, in *United States v. Heth,* 7 U.S. (3 Cranch) 399, 413 (1806), this Court held that:

> Words in a statute ought not to have retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the preexisting situation of the parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms and the manifest intention of the legislature.

This Court has frequently, and *recently,* referred to this rule as the "first rule of construction." *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982); *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See Georgetown University Hosp. v. Bowen*, 109 S. Ct. 468 (1988); *Miller v. United States*, 294 U.S. 435, 439 (1935); *Shwab v. Doyle*, 258 U.S. 529 (1922); *United States v. American Sugar Refining Co.*, 202 U.S. 563, 577 (1906). Moreover, since its inception, this rule appeared as an absolute – applicable regardless of whether the law was passed before a case arose or during the time a case was pending. *See Greene v. United States*, 376 U.S. 149, 160 (1964); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928).[5] *See also* Freeman, *Inappropriate and Uncon-*

5. In both *Magnolia* and *Greene*, the rule against retroactivity was applied when the law changed during the pendency of the case.

stitutional Retroactive Application of Superfund Liability, 42 Bus. Law. 215, 217-18 (1986).

Simultaneously, the Court has articulated a contradictory rule of statutory construction. In *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court said that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, *the law must be obeyed*. . . ." *Id.* at 110. (Emphasis added).

In *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), this Court, without mentioning the conflicting rule of construction, adopted the *Schooner Peggy* approach to a statutory change during the pendency of an appeal. The Court's only reference to the conflicting decisions was in a footnote where, without explanation, it characterized *Greene v. United States*, 376 U.S. 149 (1964), as an "exception" to the *Schooner Peggy* presumption for cases in which its operation would work "manifest injustice". 393 U.S. at 282 n.43.

The Court followed *Thorpe* in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), again adhering to *Schooner Peggy*. The Court appeared definitively to reject the presumption that statutes apply only prospectively, at least in the context of a pending case, stating, "we must reject the contention that a change in the law is to be given effect in a pending case only where that is

NOTES *(Continued)*

In *Greene*, plaintiff sued the government, alleging that his security clearance had been unlawfully revoked. After he had instituted a claim, but before a determination of the appropriate remedy, the regulations governing the procedure for obtaining restitution were changed. This Court held that the new regulations did not apply.

Similarly, in *Magnolia*, the law prescribing the method for calculating interest on a tax refund changed after an IRS "allowance" of plaintiff's refund but prior to calculation of the appropriate amount of interest. This Court held that the new method for calculating interest did not apply retroactively if the "allowance" of the refund fell prior to the change in the law.

the clear and stated intention of the legislature." 416 U.S. at 715. As in *Thorpe*, the Court referred to *Greene* as an "exception" to the general rule, where retrospective application would bring about manifest injustice. 416 U.S. at 717 n.24.

This Court's decisions since *Bradley* on the retroactivity of legislation have fueled the confusion. Although *Bradley* appeared to settle the question with respect to changes in law during a case pending upon direct review, *only once* has this Court invoked the "*Bradley* presumption" to construe a rule of law retrospectively. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (Powell, J.). The rule at issue in that case, however, was established by *judicial decision* rather than by statute. The Court has consistently distinguished between the appropriate retroactivity analysis in these two contexts. *See, e.g., United States v. Security Indust. Bank*, 459 U.S. 70, 79 (1982) ("[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student").

By contrast, on three occasions, this Court has refused to permit retroactive application of a newly-enacted law to a pending case. In *Bennett v. New Jersey*, 470 U.S. 632, 639-40 (1985), the Court, in an Opinion authored by Justice O'Conner, found it unnecessary to reconcile *Bradley* with the presumption against retroactive application because the case fell into the exception to the *Bradley* rule.

In two other recent decisions, however, this Court has chosen to adhere to the presumption that statutes operate prospectively only, without so much as mentioning *Bradley,* or the existence of the opposite presumption. *See Georgetown University Hosp. v. Bowen,* 109 S. Ct. 468 (1988); *United States v. Security Indust. Bank,* 459 U.S. 70, 79 (1982).

In *Security Indust. Bank,* in an Opinion by Chief Justice Rehnquist, the Court explained that the " 'first

rule of construction is that legislation must be considered as addressed to the future, not to the past.' " 459 U.S. at 79 (citing *Union Pacific R.Co. v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)). The Court further noted that " '[t]he presumption is very strong that a statute was not meant to act retrospectively, and it ought *never* to receive such a construction if it is susceptible of any other.' " 459 U.S. at 79-80 (emphasis added) (citing *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.,* 209 U.S. 306, 314 (1908)).[6]

Most recently, in an Opinion authored by Justice Kennedy and issued on December 12, 1988, after oral argument in this case, this Court held without exception and without qualification that *"congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."* *Georgetown University Hosp. v. Bowen,* 109 S. Ct. 468, 471 (1988) (emphasis added). The Court emphasized that *"[r]etroactivity is not favored in the law." Id.* (emphasis added).[7]

Georgetown is most significant because it cited *Greene* and *Magnolia* as primary support for the general presumption against retroactivity. In both *Greene* and *Magnolia,* the Court refused to apply a newly-enacted law *to a pending case,* relying on the presumption that legislative enactments should be applied only prospectively. In light of its implicit rejection of *Bradley* in *Georgetown,* this Court should grant certiorari to review the choice of the *Bradley* presumption by the Third

6. Ironically, Chief Justice Rehnquist cited *Schooner Peggy* as *support* for the prospective-only presumption. *Id.*

7. Justice Scalia, in his concurring opinion, likewise explained that "[r]etroactive legislation has always been looked upon with disfavor . . . and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation." *Id.* at 479 (citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle Of Jurisprudence,* 20 Minn. L. Rev. 775 (1936)).

Circuit. In the alternative, it should remand the case to the Third Circuit for reconsideration in light of *Georgetown.*

2. The Conflicting Signals In This Court's Prior Decisions On Retroactivity Have Led To Conflicting Interpretations By Lower Courts.

The conflicting signals in this Court's decisions have seriously confused the lower courts and the decisions of the Circuits are a morass on this important issue.

This case is a perfect example. The Third Circuit provided only two reasons for choosing the *Bradley* presumption over the conflicting presumption that statutes apply prospectively only.[8] First, it stated that the presumption against retroactivity applies "only when application of the new law would affect rights or obligations existing prior to the change in law." A-17. Second, citing *United States v. Security Industrial Bank,* 459 U.S. 70, 78 (1982), the court below stated that it applied the *Bradley* presumption "because to do so does not pose any constitutional problems." A-17.

Other courts have disagreed. The Fifth Circuit in *Griffon v. United States Dept. of Health and Human Services,* 802 F.2d 146, 153-55 (5th Cir. 1986) (relying on *Turner v. United States,* 410 F.2d 837 (5th Cir. 1969)), for example, identified a hard and fast rule in this Court's precedents that changes in substantive rules of law apply prospectively only, while changes in procedure or remedy are "usually held immediately applicable to pending cases, including those on appeal from a lower court." Id. at 154. *Accord Yakima Valley Cablevision, Inc. v. F.C.C.,* 794 F.2d 737, 748 (D.C. Cir.

8. The Third Circuit's opinion tracked the opinion of the Ninth Circuit in *Campbell v. United States,* 809 F.2d 563 (9th Cir. 1987).

1986); *United States v. Oakwood Downriver Medical Center,* 687 F. Supp. 302, 306 (E.D. Mich. 1988).

The Second Circuit has attempted to harmonize the two canons by simply holding that there exists "a presumption in favor of retroactivity as to judgments pending on direct review, contrary to the normal presumption against retroactivity in other circumstances." *Litton,* 746 F.2d at 174.

The Court of Appeals for the Seventh Circuit has arrived at yet a different rule in attempting to harmonize the apparently conflicting rules in this Court's decisions. The court held in *United States v. Kairys,* 782 F.2d 1374, 1381 (7th Cir. 1986), *cert. denied,* 476 U.S. 1153 (1986), that "[l]egislative enactments are presumed to be prospective absent clear statements by Congress to the contrary". The court cited *Bradley* to *strengthen,* rather than to contradict this canon of construction, for the proposition that "[t]his rule is even more appropriate when the statute affects vested rights." *Id. Accord Allied Corp. v. Acme Solvents Reclaiming, Inc.,* 691 F. Supp. 1100, 1110 (N.D. Ill. 1988) (following *Kairys* which it found to be a "combin[ation of] the *Security Indust. Bank* and *Bradley* approaches. . ."). *See also Ohse v. Hughes,* 816 F.2d 1144, 1148 n.3 (7th Cir. 1987) (applying a presumption *against* retroactivity in case where new law enacted during pendency of an appeal); *Merit Ins. Co. v. Leatherby Ins. Co.,* 728 F.2d 943, 945 (7th Cir. 1984) (holding amended §1961 not retroactive to pending case).

The Eighth Circuit has explicitly called attention to the conflict in this Court's decisions. In *Iowa Power & Light Co. v. Burlington Northern, Inc.,* 647 F.2d 796, 805 n.13 (8th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), it acknowledged that the *Bradley* rule "conflicts with the rule of statutory interpretation favoring prospective application of a new law." The Eighth Circuit pointed out that the "conflict between these principles has not often been acknowledged, let alone resolved."

The court in that case, however, found it "unnecessary to resolve the conflict between the two lines of decision because [it reached] the same result under the concept of presumed prospectivity and under the 'manifest injustice' exception to the rule applying new law to pending cases." *Id.*

The Court of Appeals for the District of Columbia Circuit has simply held that it "should struggle hard . . . to construe a statute silent as to retroactivity in a manner so as not to create a retrospective obligation." *Ralis v. RFE/RL, Inc.,* 770 F.2d 1121, 1127 (D.C. Cir. 1985). The court held that the presumption that statutes operate only prospectively coincides with the "manifest injustice" prong of the *Bradley* analysis.

Finally, some courts, apparently unable to resolve the confusion, have applied one or the other presumption without referring to *any* contrary authority. The Court of Appeals for the Fourth Circuit chose the *Bradley* approach in this way. *See Coe v. Sec. Health & Human Servs.,* 502 F.2d 1337 (4th Cir. 1974). By contrast, the Eleventh Circuit has relied on the presumption that statutes apply prospectively only without mentioning *Bradley. See Fordham v. Belcher Towing Co.,* 710 F.2d 709, 710 (11th Cir. 1983) (statute of limitations); *accord United States v. Moore,* 698 F. Supp. 622, 625 (E.D. Va. 1988).

The First, Sixth and Ninth Circuits, in opinions authored by different circuit judges, have followed *both routes. See United States v. Anguilo,* 755 F.2d 969, 970-74 (1st Cir. 1985); *Bailey v. Chattem, Inc.,* 838 F.2d 149, 155-156 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988); *Campbell v. United States,* 809 F.2d 563, 569-77 (9th Cir. 1987). In these cases, the panels from these circuits followed *Bradley* without mentioning contrary authority. In *Dion v. Secretary of Health & Human Servs.,* 823 F.2d 669, 671-72 (1st Cir. 1987), *Watson v. Secretary of Health, Educ. & Welfare,* 562

F.2d 386, 389-90 (6th Cir. 1977) (attorneys fees statute), and *United States v. Rewald,* 835 F.2d 215, 216 (9th Cir. 1987), different panels from these circuits applied the presumption in favor of prospective application of statutes to a pending case without mentioning *Bradley*.

The confusion on this important question reflects the conflicting signals from this Court and certiorari should be granted to resolve the issue.

II. THE THIRD CIRCUIT ERRED IN RULING THAT INTEREST BEGAN TO ACCRUE ON THE DATE OF VERDICT WHEN THE PLAIN LANGUAGE OF THE STATUTE PROVIDES THAT INTEREST SHALL RUN FROM THE DATE OF "JUDGMENT".

Section 1961 provides that interest "shall be calculated *from the date of the entry of the judgment* . . . ." 28 U.S.C. §1961. Ignoring the clear statutory term "judgment", both the district court and the Court of Appeals in this case held that interest should run from the date of the jury's verdict on damages. The difference can be crucial in cases where there is a delay between the date of the verdict and the date of entry of judgment. This case, again, is a prime example. Here, although only two days intervened between entry of a *judgment* and the date of the *verdict,* the difference could amount to *millions* of dollars.[9] In addition, the Court below rejected

9. After the decision in the Court of Appeals, respondents raised an issue concerning the construction of §1961 which, if respondents' position prevails, makes this two-day delay critical. According to respondents, the November 25, 1981 T-bill auction, which pursuant to amended §1961 would set the appropriate interest rate did not "settle" until December 3, 1981. Respondents argue that the "settlement" date, not the auction date, changes the applicable postjudgment interest rate. The damage verdict in this case was returned on December 2, 1981 and judgment was entered upon it on December 4. Respondents' present position is that the interest rate changed from 14.84 percent to 11.58 percent on

Kaiser's position that interest should not be calculated from the December 4, 1981 vacated judgment of the district court, but rather should run from the date of remand to the district court, after the exhaustion of all appeals.

The approach adopted by the Third Circuit appears to *mandate* the running of interest from the date of a damage verdict in all cases, *even when there is no inordinate delay between the date of the verdict and the date of entry of judgment.* No other court of appeals has so held. Moreover, quite apart from the rule laid down by the Court below, the decision aggravates an existing conflict among the circuits with respect to the appropriate date from which to calculate interest.

The commentators have noted this split. One authority recently noted that the "courts of appeals have reached . . . *differing conclusions without providing guidance or a consistent set of rules as to the circumstances that govern their decisions.*" *See* Comment, *Postjudgment Interest In Federal Court,* 37 Emory L. J. 495, 498 (1988). (Emphasis added).

Five circuits allow an "equitable construction" of §1961, which permits, but does not require, postjudgment interest measured from the date of the ascertainment of damages, whether by verdict or by an erroneous judgment, even though final judgment is delayed to

December 3, 1981. *This makes the two-day delay between date of the verdict and date of entry of judgment potentially a $4 million question of statutory construction, increasing the interest award from approximately $8.5 million to over $12 million.*

Kaiser disputes respondents' argument on this issue. The Administrative Office of the United States Courts, which is responsible for informing federal judges of the change in the §1961 rates, has considered the question and has concluded that the auction date is the appropriate date on which to change the postjudgment interest rate. A-66 The Court of Appeals declined to rule on this aspect of respondents' construction of the statute and has remanded that issue to the district court for consideration in the first instance. A-74.

some later date. *See, e.g., United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971); *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472-73 (2d Cir. 1988); *Bailey v. Chattem, Inc.*, 838 F.2d 149, 153-55 (6th Cir.), *cert. denied*, 108 S. Ct. 2831 (1988); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).

The Fifth and Seventh Circuits, on the other hand, have "equitably construed" §1961, but only to allow interest to be calculated from the date of remand to the district court after the exhaustion of all appeals. *See Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706 (5th Cir. 1986); *Brown & Williamson Tobacco Corp. v. Jacobson*, Nos. 86-2474, 86-2475, Slip. op. (7th Cir. Nov. 6, 1987).[10]

The Tenth Circuit, which also allows an "equitable construction", has adopted still another approach. In the Tenth Circuit, postjudgment interest runs from the date of an original erroneous judgment when a later judgment has been entered, but only if the later appellate reversal "was not on any basic liability errors or errors in procedure which affected the basic issues but only on a dollar value, a matter of degree." *Federal Deposit Ins. Corp. v. Rocket Oil Co.*, 865 F.2d 1158, 1161 (10th Cir. 1989). *See also Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987), *cert. dismissed*, 109 S. Ct. 7 (1988); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

The District of Columbia Circuit follows the explicit language of §1961. Postjudgment interest accrues in that circuit only from "the date on which the district court entered a final judgment under rule 54(b)." *Hooks*

10. Kaiser has consistently maintained that here, as in *Affiliated Capital*, interest should run from July 1, 1986, the date of remand from this Court.

v. Washington Sheraton Corp., 642 F.2d 614, 616-18 (D.C. Cir. 1980) In *Hooks*, the court rejected the plaintiff's argument that interest should be calculated as of the date of the jury damage verdict.

This Court has consistently held that, in the "absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *Burlington Northern R. Co. v. Oklahoma Tax Comm'n.*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597 (1986)). "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978).

Section 1961 could not be more explicit: "interest shall be calculated from *the date of the entry of the judgment* . . . ." Fed. R. Civ. P. 58 explains what is required of the district court in order to enter judgment, and explicitly distinguishes between a jury verdict and the subsequent entry of judgment. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958) (defining "entry of judgment"). The date chosen by the Court below to begin the accrual of interest was not the date judgment was entered and the Court's holding should be reviewed and reversed by this Court.

This Court should grant certiorari in this case to resolve this conflict among the circuits as to the date on which postjudgment interest begins to accrue pursuant to §1961 when either (1) judgment is not entered on the same day as the jury returns a damage verdict; or (2) the judgment of the district court is reversed or modified on appeal.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,
BLANK, ROME, COMISKY & McCAULEY

Richard P. McElroy
Counsel of Record
Ann B. Laupheimer
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

Attorneys for Petitioners

Of Counsel:

David L. Perry
Stephen B. Ringwood
Kaiser Aluminum & Chemical Corporation
300 Lakeside Drive
Oakland, CA 94643
(415) 271-5610

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc., *Appellants* No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., *Appellants* No. 88-1396

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 74-0122)

Present: STAPLETON, SCIRICA and COWEN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by Counsel October 21, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 12, 1988, be, and the same is hereby affirmed insofar as it determined that post-judgment interest would accrue from December 2, 1981, and reversed insofar as it determined that the applicable rate was Pennsylvania's six percent simple interest rate, and the cause is remanded to the said District Court for recalculation of post-judgment interest under the higher T-bill rate imposed by 28 U.S.C. §1681* (1982). All of the above in accordance with the opinion of this Court.

ATTEST:

Kelly Davis

Clerk

January 9, 1989

*28 U.S.C. §1961 apparently was intended.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

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v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Appellants No. 88-1396

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 74-0122)

Argued October 21, 1988

Before: STAPLETON, SCIRICA and COWEN, *Circuit Judges*.

(Filed January 9, 1989)

HENRY T. REATH (ARGUED)
MICHAEL M. BAYLSON
EDWARD G. BIESTER, III
DUANE, MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, PA 19102
Attorneys for Appellants-Cross Appellees

RICHARD P. McELROY (ARGUED)
ANN B. LAUPHEIMER
LESLIE N. BROCKMAN
BLANK, ROME, COMISKY & McCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Appellees-Cross Appellants

OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal arises from an order of the district court granting plaintiff's motion for post-judgment interest. Upon review, we conclude that the district court erred with respect to some aspects of its application of the relevant statute. We will affirm the district court's determination of the date from which interest runs. We will reverse the district court's grant of post-judgment interest in the amount of $2,632,886.30 because it incorrectly determined that the applicable rate under the post-judgment interest statute is Pennsylvania's six-percent simple interest rate, rather than the higher T-bill rate imposed by 28 U.S.C. § 1961 (1982).

I.

This appeal involves a determination of (1) the applicable rate of post-judgment interest, and (2) the

date from which post-judgment interest should run.[1] Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("Bonjorno"), trustees in liquidation and dissolution of Columbia Metal Culvert Co., Inc. ("Columbia"), filed a motion for award of post-judgment interest under 28 U.S.C. § 1961 against defendants Kaiser Aluminum Chemical Corp. and Kaiser Aluminum Chemical Sales, Inc. ("Kaiser").[2] The merits of the underlying case are not relevant for purposes of this appeal.[3] However, a statement of the procedural history of the case is necessary in order to resolve the issues presented.

The complaint in this case was filed in January, 1974. At the first trial, the United States District Court for the Eastern District of Pennsylvania directed a verdict for Kaiser at the conclusion of Bonjorno's

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1. Normally, there are two components of the total interest amount. The first component is the interest from the date of the loss to the date of the judgment. This element is generally awarded either as prejudgment interest or as a portion of the continuing damages up to the time of the judgment. The second component is the interest from the date of the judgment to the date that the damages are paid. This amount is awarded as post-judgment interest under 28 U.S.C. § 1961 (1982). *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985). The plaintiffs do not seek pre-judgment interest in this appeal.

2. Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby were substituted as plaintiffs when Columbia went out of business.

3. The plaintiffs were the sole stockholders of now defunct Columbia which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. The plaintiffs alleged that Kaiser monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of the Sherman Act, 15 U.S.C. 11 1 & 2 (1982). A statement of plaintiff's claims in the underlying litigation may be found in *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984).

evidence. The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence to go to the jury. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 37 (3d Cir. 1978).

A second trial held in 1979 resulted in a jury verdict for Bonjorno. On August 21, 1979, the jury awarded Bonjorno damages in the trebled amount of $5,445,000.00 and the judgment was entered on August 22, 1979. Kaiser then filed motions for a new trial and judgment NOV.

On June 17, 1981, the district court denied Kaiser's motions as to the jury's prior liability verdict, but concluded that the evidence did not support the jury's damage award and granted Kaiser's motion for a new trial as to damages only. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 518 F. Supp. 102, 109, 119 (E.D. Pa. 1981).[4] Additionally, the district court granted Kaiser's motion for judgment NOV as to a portion of the damages previously awarded by the jury in 1979. *Id.* at 114.

The limited retrial on damages was conducted in 1981 and resulted in a December 2, 1981 jury award for Bonjorno for damages in the trebled amount of $9,567,939.00. The judgment was entered on December 4, 1981. Once again, Kaiser filed motions for a new trial and judgment NOV. On January 17, 1983, the district court granted Kaiser's motion for judgment NOV as to a portion of the damages awarded by the jury, thereby reducing the judgment to $4,651,560.00 after trebling. *Bonjorno v. Kaiser Aluminum & Chem.*

4. There is some confusion as to whether this particular order was appealed. The district judge found that "[the Third Circuit Court of Appeals] affirmed the court's grant of a new trial on damages." App. at 772. However, Kaiser's counsel at oral argument claimed that such order was never appealed by the parties and we find this to be a correct statement of the case.

Corp., 559 F. Supp. 922 (E.D. Pa. 1983). This judgment was entered on January 18, 1983.

Bonjorno then appealed the reduction of the damage award, and Kaiser cross-appealed the failure of the district court to grant a new trial or to grant in full its motion for judgment NOV. On December 27, 1984, the Court of Appeals reversed the district court's partial grant of Kaiser's motion for judgment NOV as to damages, vacated the judgment entered on January 18, 1983, and reinstated and affirmed the entire $9,567,939.00 judgment entered on the jury's verdict of December 2, 1981. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 815 (3d Cir. 1984). Kaiser's petition for rehearing in banc was denied, as was its subsequent petition for certiorari. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 477 U.S. 908 (1986).

Because the Court of Appeals' December 27, 1984 opinion was silent as to the allowance of post-judgment interest, Bonjorno petitioned this Court on June 24, 1985 for instructions to be included in the mandate pursuant to Fed. R. App. P. 37 regarding interest.[5] Before this petition was acted upon by this Court, counsel for both parties entered into a stipulation providing that the district court first address all issues of interest allowable under 28 U.S.C. § 1961 and Fed. R. App. P. 37. This Court approved that stipulation on July 1, 1986 and certified the judgment in lieu of a formal mandate.

On July 1, 1986, the mandate of this Court, which had been stayed pending disposition of Kaiser's

5. Fed. R. App. P. 37 provides in pertinent part:

> If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

petition for a writ of certiorari, was issued to the district court. On July 3, 1986, Kaiser paid $9,567,939.00 to Bonjorno. This Court's certified judgment did not instruct the district court on the issues of post-judgment interest.

After full briefing, the district court heard oral argument on the post-judgment interest issues on December 23, 1986. On April 11, 1988, it issued its Memorandum and Order awarding $2,632,886.30 in post-judgment interest to Bonjorno. App. at 770. The district court held that interest ran from December 2, 1981, the date of the damage verdict on which the correct judgment would have been entered but for the district court's partial grant of judgment NOV.

The district court next addressed the question of whether the amendments to 28 U.S.C. § 1961 apply to money judgments entered prior to October 1, 1982, the effective date of the amendments. Specifically, having determined that the interest should run from December 2, 1981, the district court was faced with the question of whether the higher interest rate imposed by the amended version of 28 U.S.C. § 1961 should apply from December 2, 1981-- ten months before the effective date of the amendments. Interpreting *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), the district court refused to apply the amended statute "retroactively" and, instead, applied the version of the statute which was in effect on the December 2, 1981 jury verdict date. App. at 784.

The federal statute governing awards of post-judgment interest in effect from the time Columbia filed its complaint on December 23, 1974 through December 2, 1981 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment at the rate allowed by State law.

28 U.S.C. § 1961 (1976)(amended 1982).

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 ("FCIA"), Pub. L. No. 97-164, 96 Stat. 25 (1982) which amended 28 U.S.C. § 1961 (effective October 1, 1982). The amended statute states in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all federal judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

28 U.S.C. § 1961 (1982).

Thus, the district court's decision applies the six-percent simple interest rate required under

Pennsylvania law, as opposed to the significantly higher "T-bill" rate required by the amended version of 28 U.S.C. § 1961.[6]

The district court also rejected Bonjorno's argument that interest continued to run after Kaiser paid the $9,567,939.00 judgment on July 3, 1986. After a full evidentiary hearing, the court on April 11, 1988 made a factual finding that the parties intended the July 3, 1986 payment as a payment of the principal amount. App. at 792. Bonjorno filed a notice of appeal from the April 11, 1988 Order and Kaiser filed its notice of cross-appeal on May 11, 1988.

II.

We note at the outset of our analysis that the availability of interest in an action arising under a federal statute is governed by federal law, not the law of the forum state. *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987). Because Bonjorno's underlying claims allege violations of the federal antitrust laws, state substantive law is not implicated. *Id.*

We have jurisdiction over this appeal because the judgment of the district court is "final" for purposes of 28 U.S.C. § 1291 (1982). Determining whether the FCIA applies to judgments entered prior to its effective date presents an issue of law, over which we have plenary review. *See, e.g., Campbell v. United States*, 809 F.2d 563, 567 (9th Cir. 1987). The district court's determination that the July 3, 1986 payment was intended to go to principal presents a factual question which we review subject to the clearly erroneous standard.

6. The "T-bill" rate is "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." 28 U.S.C. § 1961 (1982).

A.

THE DATE FROM WHICH INTEREST BEGINS TO RUN

We must first determine the date from which post-judgment interest runs. In this case, the parties have suggested three dates as possible starting points for the accrual of post judgment interest: (1) Kaiser argues that the district court correctly began the accrual of interest on December 2, 1981, the date of the initial jury verdict on damages which was vacated and then reinstated; (2) alternatively, Kaiser argues that interest accrues from July 1, 1986, the date of this Court's mandate; and (3) Bonjorno argues that interest should accrue from August 16, 1979, the date the jury delivered its liability verdict.

First, we reject the third possibility. Bonjorno argues that interest should accrue from the date of the original liability verdict-- August, 1979-- because liability was ultimately affirmed. *See Bonjorno*, 752 F.2d 802. However, the August 16, 1979 verdict on liability alone was insufficient under Fed. R. Civ. P. 54(c) to allow or require the court to enter judgment. Little if any authority supports the position that post-judgment interest accrues from the date of an unliquidated verdict or from a judgment vacated by a district court which is never reinstated, modified or even appealed. The vast majority of cases which construe section 1961 to allow interest to run from a verdict rather than a "judgment" involve verdicts which include an assessment of damages where judgment is later entered on the verdict amount. *See, e.g., Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Givens v. Missouri-Kansas-Texas R.R. Co.*, 196 F.2d 905 (5th Cir. 1952). In *Poleto*, we stated that "the purpose of post-judgment interest is to

compensate the successful plaintiff for being deprived of compensation for the loss from the time between the *ascertainment of the damage* and the payment by the defendant." 826 F.2d at 1280 (emphasis added). This reasoning weighs against permitting Bonjorno to recover interest from August 16, 1979 (the date of the unliquidated liability verdict) or August 22, 1979 (the date of the first damage verdict which was vacated and never reinstated, increased, reduced or even appealed).[7]

We next choose between December 2, 1981 and July 1, 1986 as the proper date to begin the accrual of interest. Kaiser argued in the district court that because its liability for the $9,567,939.00 judgment did not become final until this Court issued its mandate on July 1, 1986, interest should run from this date.

We note that a split among the courts of appeals for several of the circuits exists with respect to the proper application of 28 U.S.C. § 1961, i.e., whether the date of the original award is used if it is later vacated but then reinstated or whether the date of the later award is used.[8] However, the Third Circuit Court of Appeals has previously addressed this issue.

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7. The cases allowing interest to run from a date other than the final judgment date involve situations in which the court either reinstates a verdict or modifies the amount of the judgment. *See, e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897 (3d Cir. 1985)(modifying a judgment); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984)(holding that plaintiff is entitled only to post-judgment interest from the date of the first judgment to the date of the second judgment because the claim was not liquidated until the first judgment).

8. *See Chattem, Inc. v. Bailey*, ___ U.S. ___, 108 S. Ct. 2831 (1988)(White, J.)(dissenting from denial of certiorari). The Courts of Appeals for the Seventh and Tenth Circuits use the later date for purposes of calculating post-judgment interest under this statute. *See Harris v. Chicago Great W. Ry Co.*, 197 F.2d 829, 836 (7th Cir. 1952); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 366 (10th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980). By contrast, the Courts of Appeals for the First, Second, Third, Fifth, Sixth, Eighth and Ninth Circuits have adopted a broader reading of § 1961 and begin the accrual of interest from the date of the initial judgment. *See United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971); *Smith v. National Railroad Passenger Corp.*, 856 F.2d 467 (2d Cir. 1988); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280-81 (3d Cir. 1987); *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 710 (5th Cir. 1986); *Chattem v. Bailey*, 838 F.2d 149, 153 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2831 (1988); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983). In *Smith*, the Court of Appeals for the Second Circuit recently reversed the position it had earlier taken in *Powers v. New York Cent. R.R.*, 251 F.2d 813, 818 (2d Cir. 1958).

We hold that the interest properly accrues from the December 2, 1981 judgment. *See Institutionalized Juveniles*, 758 F.2d 897, 927 n.48 (3d Cir. 1985) (stating that "[w]e . . . reject the rule articulated in *Harris v. Chicago Great Western Ry.*, 197 F.2d 829, 835 (7th Cir. 1952), which would allow interest only from the date of the revised judgment [i.e., following the Court of Appeal's mandate].").[9]

In *Institutionalized Juveniles*, 758 F.2d at 927, this Court "adopt[ed] the rule set out in" *Perkins v. Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973). In addressing the amount of post-judgment interest

9. Kaiser acknowledges in its brief that this Court of Appeals would most likely rule that the earlier date applies; however, it presents the argument for purposes of preserving it for possible appeal to the United States Supreme Court in light of the conflict among circuit courts. Kaiser states that "Kaiser acknowledges, however, that the combined effect of this Court's holding in *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987), and *Institutionalized Juveniles v. Sec. Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985), may foreclose this argument before this Court." Appellee's Brief at 41.

available on a reduced attorney fee award, the court in *Perkins* held that the reduction of the award was a partial affirmance of the district court judgment and that interest would run from the date the district court erroneously awarded the excessive fees. 487 F.2d at 676. The court stated that "interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." *Id.*

Had there been no error by the district court in this case, a judgment for damages would have been entered on December 4, 1981, based on the jury verdict returned December 2, 1981. The district court then correctly revised its decision to conform with *Poleto*, 826 F.2d at 1280, stating that interest is calculated from the date of the damage verdict underlying the appropriate judgment. Accordingly, the district court correctly awarded interest from December 2, 1981.[10]

B.

THE APPLICABLE LAW AND RATE OF INTEREST

We next address the issue of which version of the FCIA is to govern the calculation of post-judgment interest.[11] When the December 2, 1981 jury verdict in

10. *See, e.g., Poleto*, 826 F.2d at 1280 (stating that "[t]he purpose of postjudgment interest is not diluted where, as here, the initial ascertainment of damages is left standing but a delay occurs between the date of the ascertainment and the date of the eventual entry of judgment."). In *Poleto*, the verdict and the entry of judgment were separated by approximately three months. We concluded that "[b]ecause all the substantive issues were decided by the jury upon the verdict . . . it is analogous to a final judgment for purposes of section 1961." *Id.*

11. We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

this case was rendered, 28 U.S.C. § 1961 applied the relevant state interest rate, which in this case was Pennsylvania's six percent simple interest rate. *See* 28 U.S.C. § 1961 (1976).[12] Effective October 1, 1982, the statute was amended to provide a uniform federal post-judgment interest rate equal to the T-bill rate. *See* 28 U.S.C. § 1961(a)(1982).

The various courts of appeals have disagreed over whether to apply the federal method of determining interest to judgments entered before October 1, 1982. *See, e.g., Bailey v. Chattem, Inc.*, 838 F.2d 149, 156 (6th Cir. 1988)(applying the pre-amendment rate of interest up to the effective date of the amendments and applying the post-amendment rate thereafter); *Campbell v. United States*, 809 F.2d 563, 569 (9th Cir. 1987)(same); *Litton Sys. v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984)(holding that the FCIA does not apply to a June 1981 judgment against a private party for interest accruing either after the judgment or after the effective date); *R.W.T. v. Dalton*, 712 F.2d 1225, 1234-35 (8th Cir.)(holding that the amended statute should apply to a pre-effective date judgment for the entire post-judgment period), *cert. denied*, 464 U.S. 1009 (1983). Thus, three interpretations have been presented and approved by the various courts of appeals: (1) the FCIA applies to judgments entered after the effective date; (2) it applies to judgments entered before the effective date for the entire post-judgment period; and (3) it applies to judgments entered before the effective date but only for interest accruing in the period after the effective date.[13] *See Campbell*, 809 F.2d at 568.

12. The post-judgment interest rate in Pennsylvania is calculated at the legal rate which is six percent. 42 Pa. Cons. Stat. Ann. § 8101 (Purdon 1988).

13. The Courts of Appeals for the Second, Fourth, Fifth and Seventh Circuits agree that amended § 1961 should not to be

We find that the issue is whether "to apply the law in effect at the time [a court] renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board*, 416 U.S. 696, 711 (1974). *Bradley*, therefore, provides the starting point for our analysis.

The district court, relying on two cases in the Eastern District of Pennsylvania, found that "courts in this Circuit have uniformly assumed the correctness of the holding herein that the prior version of section 1961 applies to judgments entered while it was in effect and amended section 1961 applies to judgments entered on and after its effective date." App. at 789, *citing United States ex rel. Billows Elec. Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983)(holding that the FCIA does not apply to a July 1981 judgment against a private party for interest accruing after the judgment), *aff'd mem.*, 729 F.2d 1450 (3d Cir. 1984) and *Peterson v. Crown Fin. Corp.*, 553 F. Supp. 114 (E.D. Pa. 1982)(same holding for a July 1979 judgment). While the United States Court for the Eastern District of Pennsylvania has refused to apply the post-amendment rate to judgments pre-dating the effective date of the amendments, its decisions do not bind this Court. We note that neither of these cases cite *Bradley*.[14] Thus, we view this issue as an open question not yet squarely addressed by this Court.

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construed to apply to judgments entered before its effective date, even if on that date they were pending on direct review. *See Brooks v. United States*, 757 F.2d 734, 741 (1985); *Litton*, 746 F.2d at 174; *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir. 1984), *cert. denied*, 469 U.S. 918 (1984); *United States v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983).

14. *Bradley* does not characterize the issue as one of "retroactivity."

At a first glance, the *Bradley* presumption of applying the law in effect at the time a court renders its decision in the absence of contrary legislative intent seems inconsistent with the long-standing rule of statutory construction that statutes are presumed to have only "prospective" effect and will be given "retroactive" effect only if there is affirmative legislative direction to do so. However, upon closer examination, the two principles are not in conflict here.[15] While the term "retroactive" is commonly used to refer to statutes that operate on pre-enactment transactions and pre-existing rights or obligations, a statute is not "retroactive" simply because facts from the pre-enactment period are implicated. The presumption against "retroactivity" has generally been applied only when application of the new law would affect rights or obligations existing prior to the change in law. *See, e.g., United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982); *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). We apply the *Bradley* presumption in this case because to do so does not pose any constitutional problems.

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15. In *Bradley*, Justice Blackmun, writing for a unanimous Court, cautioned that the issue was not whether the fee statute applied "retroactively" to fees for services rendered prior to enactment, but rather whether a fee award was justified by current law. He states:

> The question, properly viewed, then, is not simply one relating to the propriety of retroactive application of § 718 to services rendered prior to its enactment, but rather, one relating to the applicability of that section to a situation where the propriety of a fee award was pending resolution on appeal when the statute became law.

416 U.S. at 710.

1. *Legislative History*

We turn next to the legislative history to determine whether Congress intended that the FCIA not be applied to interest accruing after the effective date on judgments entered prior to that date. We agree with the Courts of Appeals for the Second and Ninth Circuits that this presumption may be displaced by "fair indication that the statute, properly construed, has only prospective effect." *See Litton Systems*, 746 F.2d at 174; *Campbell*, 809 F.2d at 572 (quoting *Litton Systems*, 746 F.2d at 174). However, if the legislative history is unclear, the *Bradley* presumption should control. *See Bradley*, 416 U.S. at 715-16.[16]

Unfortunately, the legislative history concerning the effect of the FCIA's post-judgment interest provision on unpaid judgments entered prior to the date of enactment is sparse. In *Campbell*, the Court of Appeals for the Ninth Circuit stated that it was "not persuaded that this scant indication in the statute and legislative history constitutes a 'fair' indication that the FCIA should not be interpreted to impose interest at the T-bill rate in the period *following* the enactment date." 809 F.2d at 574 (emphasis in original). The "scant indication" was that the effective date of the amendments was delayed for a period after the date of the enactment of the amendments. The district court in this case found persuasive the fact that Congress specifically postponed the effective date of the

16. The Court in *Bradley* did not explicitly hold that a change in the law must be given effect to pending cases unless a clear indication existed to the contrary. Nevertheless, although the Court stated that "neither our decision in *Thorpe* nor our decision today purports to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary," *id.*, it did apply the *Bradley* presumption of retroactivity in the face of the "equivocal" legislative history of the statute at issue in the case, *id.* at 716-17.

amendments for six months from passage on April 2, 1982 until October 1, 1982. App. at 787-88, *citing* Pub. L. No. 97-164, § 402, 96 Stat. 57 (1982). The district court concluded on this basis that Congress did not intend interest to accrue at the T-bill rate on judgments entered before October 1, 1982. We disagree. This ambiguous move to delay the effective date of the amendment is insufficient to displace the *Bradley* presumption.

We are also guided by the principle of statutory construction that courts assume that "our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Consequently, we may assume that, when Congress passed the amendment to section 1961, as well as the entire FCIA, it was aware that courts would apply the amendment to cases pending on appeal under *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) and *Bradley v. Board of Education*, 416 U.S. 696 (1974). In light of this, it seems unreasonable to conclude that Congress intended its delay in the effective date of the provisions of the entire Act to act as a directive to the judiciary to disregard *Thorpe* and *Bradley* and to apply the amendment prospectively.

We are unpersuaded by the *Litton* court's reasoning that awarding interest beginning on the effective date when the interest is keyed to some past date (the date of judgment) "makes no economic sense at all" and that Congress could not have intended such a result. *Litton*, 746 F.2d at 175.[17] The Court of Appeals

17. We also acknowledge the dissent's objection to retroactive application which is based on the hypothetical situation in which interest on judgments entered simultaneously may accrue at different rates depending on whether the appeal from those judgments endures beyond the effective date. However, the dissent ignores the fact that such differing results may occur in any case in

for the Second Circuit also stated in *Litton* that a party found liable would receive an "unwarranted windfall" if interest rates subsequently declined. *Id.* However, if the rates rise after entry of judgment, the prevailing party would not be fully compensated for the loss of the use of its money. It appears that Congress believed that the T-bill rate would strike an adequate balance between the dangers of windfall and undercompensation. Further, we believe that Congress sought to establish a scheme which would be easy to administer -- a goal which is undermined if more than one interest rate applies. Therefore, we find that a proper construction of the FCIA does not require that the *Bradley* presumption be set aside.

Finally, this Court has cited with approval *R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983), which holds that the T-bill rate applies even with respect to judgments entered prior to the effective date of the amendments. *See Institutionalized Juveniles*, 758 F.2d at 927 n.49. We find the rule adopted by the Court of Appeals for the Eighth Circuit to be the better rule, even though it is a minority position among the circuit courts. The purpose of interest on the judgment is to preserve the value of the judgment against the diminishing effects of the time value of money, and the *Dalton* rule comes closest to achieving this objective.[18]

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which the *Bradley* presumption controls. Whether a change in the law must be applied to cases pending on appeal under *Bradley* must always rest on the fortuitous continuation of the appeal beyond the time the law to be applied underwent the change at issue.

18. *See* Note, *The Postjudgment Interest Rate in Pennsylvania: Ignoring Reality for Too Long*, 23 Duq. L. Rev. 1083-84 (1985)(footnotes omitted) (stating that Pennsylvania's rate "represents the lowest non-variable postjudgment interest rate applied in the United States, both in the state and federal courts. At best, this represents a legislative oversight by the Pennsylvania Legislature; at worst, it is indicative of a . . . failure to grasp the realities of the modern economic world. . . .").

2. *"Manifest Injustice"*

While we find that the legislative history of the FCIA does not displace the *Bradley* presumption, the presumption may, nevertheless, be overcome if the *Bradley* exceptions for manifest injustice apply. *Bradley* requires that interest accrue prospectively in this case if such a construction would not result in "manifest injustice." 416 U.S. at 716-17. *Bradley* enunciates the following three-part test pertaining to finding "manifest injustice":

> The concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon these rights.

416 U.S. at 717.

With respect to the first *Bradley* factor, the Supreme Court in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), stated that, "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights . . . are sacrificed for national purposes, . . . the court must decide according to existing laws." The plaintiffs in the present case are acting as private attorneys general in enforcing federal policy embodied in the antitrust laws. *See, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 634-35 (1985) (stating that "[a] claim under the antitrust laws is not merely a private matter.") (citations omitted). We believe that an action to increase the rate at which post judgment interest accrued on a judgment awarded to a private antitrust plaintiff also implicates national interests. *But see*

Litton, 746 F.2d at 175.[19] When antitrust plaintiffs serve the national interest by acting as private attorneys general in enforcing the antitrust laws, the congressional mandate that plaintiffs who prevail in such a suit be awarded treble damages should not be diminished by insufficient postjudgment interest. Therefore, this factor weighs heavily against finding manifest injustice.

The second factor concerns the nature and identity of the parties. In *Bradley*, the Supreme Court stated that it "has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720. Bonjorno's right to receive interest did not mature or become unconditional until a final controlling judgment was entered on the merits. This did not occur until after the effective date of the amendments.

The third *Bradley* factor pertains to the nature of the impact of the change in law upon these rights. The *Bradley* Court suggested that to find manifest injustice, the Court must find that "new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. This inquiry focuses on "whether the new statutory obligation, if known, would have caused the defendant to alter its conduct." *Campbell*, 809 F.2d at 576. We agree, only in part, with the Ninth

19. The Second Circuit Court of Appeals stated in *Litton* that:

> [w]hatever consideration is appropriate for antitrust plaintiffs as private attorneys general bringing suits that serve the national interest, there is little doubt that national interests are not affected by the outcome of this collateral action to secure an increase in the rate of post-judgment interest.

Litton, 746 F.2d at 175.

Circuit's analysis in *Campbell* that while "imposition of the T-bill rate for the period *prior* to the enactment or effective dates might impose unanticipated obligations on litigants, we cannot say the same for interest accruing after the delayed effective date." *Id.* As in *Campbell*, the fact that this case involves a judgment that was appealed long after the enactment date supports the position that the imposition of the T-bill rate after the effective date does not constitute an unforeseeable obligation. However, we go even further and hold that imposition of the T-bill rate would not constitute manifest injustice even for the ten month period between the December 2, 1981 judgment from which interest in this case accrues and the October 1, 1982 effective date of the amendments. We believe that the Court of Appeals for the Eighth Circuit in *Dalton* correctly applied *The Schooner Peggy* and the *Bradley* presumption to hold that the amended version of section 1961 applies as current law, regardless of whether interest begins to accrue under the statute prior to October 1, 1982.

In view of the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in the law on their rights, we conclude that application of the T-bill rate to the entire period does not result in manifest injustice. Thus, we conclude that the district court erred in applying Pennsylvania's six percent simple interest rate in this case.

C.

The July 3, 1986 Payment

On July 3, 1986, Kaiser paid Bonjorno the sum of $9,567,939.00. The United States rule provides that payments on judgments are applied first to accrued interest and then to principal, unless there is a "'clearly expressed intention [by the parties] to handle

allocation some other way.'" *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1025 (3d Cir. 1984)(quoting *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 507 (5th Cir. 1973)). The court below held an evidentiary hearing to determine the intent of the parties and found that the parties intended the payment as full payment of the outstanding principal. App. at 792. The court then found that the payment "would satisfy the principal judgment and stop the accrual of post-judgment interest." App. at 793. We affirm the finding of the district court that the payment of $9,567,939.00, the exact amount of the jury award without accrued interest, was intended by all parties to be allocated to the principal sum due.

III.

CONCLUSION

In summary, we conclude that interest commenced accruing on the $9,567,939.00 jury verdict entered on December 2, 1981. For the reasons set forth above, the verdict draws interest pursuant to the amended version of 28 U.S.C. § 1961 from December 2, 1981.

Because we find that the higher T-bill rate must be applied from December 2, 1981, the July 3 payment did not stop the accrual of interest.[20] On each December 2, the anniversary of the jury verdict, a new principal is established. The July 3 payment must be subtracted from the new principal which exists just prior to the July 3, 1986 payment. Interest then accrues in the same fashion on this new principal until the judgment is paid.

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20. According to a July 27, 1982 Memorandum on Post-Judgment Interest issued by the Office of the United States Courts, interest is computed daily and compounded annually. App. at 475.

STAPLETON, *Circuit Judge*, concurring and dissenting.

I concur in the court's holding that the plaintiff should receive post-judgment interest on $9,567,939 from December 2, 1981. If the district court had not erred by vacating the judgment entered on the jury's verdict of December 2, 1981, the plaintiffs would have received post-judgment interest commencing on that date. *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987). Under the teachings of *Institutionalized Juveniles v. Secretary*, 758 F.2d 897 (3d Cir. 1985), the fact that the plaintiffs were required to litigate an appeal to fully vindicate their rights should not result in post-judgment interest commencing any later than that date.

I reject the plaintiffs' suggestion that interest should run from August 16, 1979 because I know of no logic or authority which supports the proposition that post-judgment interest should commence as of the date of a verdict *as to liability only*. Finally, I conclude that the date of the 1979 damage verdict is inappropriate as well. Where, as here, a judgment and damage verdict are vacated because the plaintiffs failed to supply evidence to support the jury's damage award and that vacation remains unchallenged, I perceive no justification for awarding post-judgment interest back to the date of the vacated verdict or judgment.

I am constrained to dissent, however, from the court's holding that the 1982 amendment to 28 U.S.C. § 1961 is applicable to this case. Like the Courts of Appeals for the Second, Fourth, Fifth, and Seventh Circuits,[1] I would hold that this amendment does not

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1. *Litton Systems v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984); *U.S. v. Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985); *Merit Ins. Co. v. Leatherby Ins. Co.*, 728 F.2d 943, 944 (7th Cir. 1984) (per curiam), *cert. denied* 469 U.S. 918 (1984). In a

apply to any judgment entered prior to October 1, 1982, the effective date of the amendment, without regard to whether there was an appeal from the judgment pending on that date.[2]

I would uphold the decision of the district court with respect to the applicable rate of post-judgment interest for essentially the reasons articulated by Judge Newman in *Litton Systems v. American Tel. & Tel. Co.*, 746 F.2d 168 (2d Cir. 1984), and by Judge Johnson in *Brooks v. United States*, 757 F.2d 734 (5th Cir. 1985). I will add only two thoughts, both of which go to the issue of whether Congress would wish the presumption of *Bradley v. Board of Education*, 416 U.S. 696 (1974) applied in connection with the amendment to § 1961.

Unlike most other legislatively established rules of law, the rule established by § 1961 after its amendment, as well as the rule established by it before, are focused on a particular point in time -- the date of the entry of judgment. On that date, under both rules, the rate of post-judgment interest is fixed once and for all time for the particular case, and the rate fixed takes effect immediately. At any time thereafter, the

July 27, 1982 memorandum to all Federal Judges, Magistrates, Court Executives, and Court Clerks, the Administrative Office of the United States Courts also adopted the position that the 1982 amendment to § 1961 should not be applied retroactively, stating:

> It is our view that the new rate will apply only to judgments entered on or after [the effective date]. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

2. *Institutionalized Juveniles v. Sec. of Public Welfare*, 758 F.2d 879, 927 (3d Cir. 1985), is not in conflict with this conclusion. The Court there held that the new post-judgment interest rate should be applied to the original order allowing the award of counsel fees which was entered on July 26, 1983, well after the effective date of the amendment.

judgment may be executed upon by the plaintiff in the absence of a supersedeas bond or may be voluntarily satisfied by the defendant whether or not there is to be an appeal. Given this focus on the date of the entry of judgment, I think it highly unlikely that Congress intended the post-judgment interest rate in a particular case to be retroactively altered in the event an appeal lasted beyond the effective date of the amendment.

The Federal Courts Improvement Act containing the amendment to § 1961 was enacted on April 2, 1982. In the Act, Congress expressly provided that "[u]nless otherwise specified, the provisions of [the] Act shall take effect on October 1, 1982." Pub.L. No. 97-164, § 402. Since Congress did not "otherwise specify" with respect to the amendment to § 1961, this effective date provision pos poned the change in the manner of establishing a post-judgment interest rate for a period of six months. Thus, Congress chose to postpone for a very substantial period the relief it was affording to plaintiffs whom it perceived as being substantially undercompensated by prevailing state interest rates. This decision suggests to me that Congress had a substantial countervailing concern about the reliance interests of litigants who had made or would make decisions concerning appeals and/or the payment of judgments based on the old rates. Given that this concern is equally implicated whether or not an appeal winds up continuing beyond the effective date of the Act, I am unwilling to attribute to Congress an intent to discriminate between the holders of simultaneously entered judgments based on whether their appeals were still pending on the effective date of the Act.

For the foregoing reasons, I would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,
Appellants No. 88-1396

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND NYGAARD, *Circuit Judges*

The petitions for rehearing filed by appellants in No. 88-1318 and appellants in No. 88-1396 having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

Judge Stapleton would have granted rehearing in banc for the reason set forth in his dissent. Judge Becker and Judge Hutchinson would also have granted rehearing in banc.

By the Court,

Circuit Judge

Dated: February 13, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. APRIL 11th, 1988

Plaintiffs Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby (hereinafter "Bonjorno"), trustees in liquidation and dissolution of Columbia Metal Culvert Co., Inc. ("Columbia"), filed a motion for award of post-judgment[1] interest under 28 U.S.C. §1961 against defendants Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser"). Following briefing, oral argument, and an evidentiary hearing, for the reasons stated below, the court awards plaintiffs $2,632,886.30 in post-judgment interest.

On December 23, 1974, Columbia filed its complaint alleging that Kaiser monopolized the aluminum drainage pipe market in the mid-Atlantic region in

1. On May 30, 1980, the court ordered Bonjorno, Kerr and Clisby substituted as parties under Fed.R.Civ.P. 25(c) after Columbia was liquidated and its rights and interest in the litigation were assigned to them. The allocation of the proceeds of this litigation was in dispute and independently determined in Civil Action No. 87-1171.

violation of 15 U.S.C. §§1 and 2.[2] The court (The Honorable Edward N. Cahn) held a jury trial beginning in April, 1977;[3] at the conclusion of Columbia's case, the court granted Kaiser's motions for directed verdict on all counts. The Court of Appeals reversed and remanded the case for trial, *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir. 1978); the United States Supreme Court then denied a petition for writ of certiorari, 439 U.S. 876 (1978).

The action on remand was tried to a jury in July, 1979; on special interrogatories on liability issues, the jury returned a verdict for plaintiff on August 16, 1979. That same jury determined, also on special interrogatories, damages in the amount of $1,815,000 on August 21, 1979; the court trebled the damages as required by law and entered judgment on that verdict in the amount of $5,445,000 on August 22, 1979.

Kaiser moved for judgment n.o.v. and for a new trial; on June 17, 1981, this court granted the motion for judgment n.o.v. in part, on the ground that plaintiffs were not entitled to damages awarded for increased metal costs in years in which plaintiffs were not seeking damages; finding insufficient evidence from which a jury could award other damages, the court also granted Kaiser's motion for a new trial as to damages only. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102 (E.D. Pa. 1981).

On retrial on damages only, a new jury awarded plaintiffs damages in the amount of $3,189,313 on

2. The judgment giving rise to this motion was entered on December 4, 1981, vacated in part by this court on January 18, 1983 and reinstated by the Court of Appeals on December 27, 1984. A statement of plaintiffs' claims in the underlying litigation may be found in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984), *affirming in part and reversing in part*, 518 F. Supp. 102 (E.D. Pa. 1981).

3. This case was transferred from the docket of The Honorable Edward N. Cahn to this court's docket on October 20, 1978.

December 2, 1981. The court entered judgment for plaintiffs on the jury verdict in the trebled amount of $9,567,939 on December 4, 1981. Kaiser filed timely motions for judgment n.o.v. and a new trial. The court granted Kaiser's motion for judgment n.o.v. as to part of the damages awarded, vacated the December 4, 1981 judgment, and entered judgment on January 18, 1983 on damages in the trebled amount of $4,651,560. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (E.D. Pa. 1983).

Bonjorno appealed the court's partial grant of judgment n.o.v. on damages; Kaiser appealed the failure of the court to grant a new trial or to grant in full its motion for judgment n.o.v. On December 27, 1984, the Court of Appeals affirmed the liability determination, affirmed the court's grant of a new trial on damages, reversed the court's partial grant of judgment n.o.v. on the jury award of December 2, 1981, vacated the judgment entered January 18, 1983, and reinstated the $9,567,939 judgment entered on the jury's damage award of December 2, 1981. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). Kaiser filed a petition for rehearing *en banc* that the Third Circuit denied, Circuit Judges Adams and Becker dissenting. Kaiser filed a petition for a writ of certiorari with the Supreme Court on June 6, 1985; the Third Circuit stayed the issuance of its mandate pending the resolution of the petition for writ of certiorari. On June 23, 1986, the Supreme Court denied defendants' petition with Justice White dissenting. ___ U.S. ___, 106 S.Ct. 3284, 91 L.Ed.2d 572 (1986).

Because the Third Circuit's December 27, 1984 opinion was silent concerning allowance of post-judgment interest, Bonjorno petitioned the Third Circuit on June 24, 1985 to include in the mandate instructions regarding interest in accordance with Fed.R.App.P. 37. Before the Third Circuit issued the mandate, counsel for plaintiffs and Kaiser stipulated that this court should

first address all issues of interest allowable under 28 U.S.C. §1961 and Fed.R.App.P. 37. The Third Circuit approved that stipulation on July 1, 1986 and certified the judgment in lieu of a formal mandate. On July 3, 1986, Kaiser paid $9,567,939 to plaintiffs.

The stipulation stated, in relevant part:

> 1. The mandate (or certified copy of the judgment in lieu of a mandate) shall issue to the United States District Court for the Eastern District of Pennsylvania immediately, and shall state that the District Court should consider all issues regarding the calculation of interest in this case. . . .
>
> 3. Defendants – Appellees – Cross Appellants ("Defendants") agree that they will not contend that Plaintiffs have waived any procedural or substantive claim for interest by this Court [the Court of Appeals] not considering the issue of interest.

The Court of Appeals' certified judgment did not instruct this court on determining issues of post-judgment interest.

The federal statute governing awards of post-judgment interest in effect when Columbia filed its complaint on December 23, 1974, stated:

> Interest shall be allowed on any *money judgment* in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

(Emphasis added). 28 U.S.C. §1961 (1976). On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982 which, *inter alia,* amended 28 U.S.C. §1961, effective October 1, 1982. *See* Pub.L. No. 97-164,

§§304(a), 402 (1982). The present statute states in part:

> (a) Interest shall be allowed on any *money judgment* in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.[4]

(Emphasis added).

Bonjorno is entitled to post-judgment interest because of the mandatory language in both prior and amended §1961: "Interest *shall* be allowed on any money judgment in a civil case recovered in a district court . . . . from the date of the entry of the judgment . . . ." 28 U.S.C. §1961(a) (1987); 28 U.S.C. §1961 (1976). The questions before the court are the date from which interest accrues and the rate of interest.

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4. Unless noted otherwise, the court will refer to 28 U.S.C. §1961(a) as "amended §1961(a)" and refer to the statute in effect until October 1, 1982 as "prior version of §1961."

The claims upon which plaintiffs obtained a money judgment arose under the Sherman Act, 15 U.S.C. §§1 and 2, a federal statute; questions concerning the award of post-judgment interest are governed by federal law. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied sub nom., Technograph, Inc. v. General Motors Corp.*, 474 U.S. 819 (1985); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 675 (9th Cir. 1973). The federal statute governing awards of interest upon money judgments is interpreted liberally to achieve equity. *See National Bank of the Commonwealth v. Mechanics National Bank*, 94 U.S. 437 (1877) (equitably construing a predecessor statute to 28 U.S.C. §1961 to allow interest to run from the date of verdict where appreciable time elapsed between verdict and entry of judgment and plaintiff was not at fault for the delay); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987) (rejecting a "narrow" interpretation of 28 U.S.C. §1961 and interpreting the phrase "date of entry of judgment" to mean "date of verdict" where there was a three-month delay from verdict to entry of judgment).

1. Date Accrual of Interest Begins

The issue concerning the date from which plaintiffs are entitled to receive interest depends on "the date of the entry of the judgment" when the judgment below has been modified or reversed in part on appeal. Under Fed.R.App. 37,[5] if a district court judgment is affirmed,

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5. "Unless otherwise provided by law, *if a judgment for money* in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money may be entered in the district court, *the mandate shall contain instructions with respect to allowance of interest.*"
Fed.R.App.P. 37 (emphasis added).

post-judgment interest accrues from the date the judgment was entered in the district court. However, if a district court judgment is modified or reversed with appellate court direction to enter a money judgment, the Court of Appeals has wide discretion to review the facts and equities and include instructions with respect to the allowance of interest in its mandate. *See generally* Fed.R.App.P. 37 notes of advisory committee. Federal Rule of Appellate Procedure 37 is a "reminder" that a party should seek a recall of the mandate where it is silent as to entry of post-judgment interest. *See* Fed.R.App.P. 37 notes of advisory committee. A district court lacks the power to award post-judgment interest where the mandate from the appellate court directs entry of judgment upon a verdict but is silent concerning interest. *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948).

In the instant case, *before* the Court of Appeals issued its mandate, the parties entered a stipulation allowing this trial court to consider "all issues regarding the calculation of interest" and the Court of Appeals approved this stipulation. At oral argument, both parties stated they interpreted that stipulation to grant this court the same discretion to determine when interest began to run as if the question were before the Court of Appeals when issuing its mandate. Because the Court of Appeals vacated this court's January 18, 1983 judgment and ordered reinstatement of the December 4, 1981 judgment and, in modifying or reversing judgment, had the power under Fed.R.App.P. 37 and §1961 to consider the facts and equities regarding an award of interest, this court may reasonably assume it has been granted authority by the Court of Appeals to consider the law and the equities of this case in deciding the issues presented by plaintiffs' motion for award of interest on the judgment.

Bonjorno originally contended that interest accrued from August 16, 1979, the date the jury returned a

verdict on liability in favor of Columbia, because Kaiser's liability was then "fixed by the jury." However, Bonjorno now contends that the court should award interest on the judgment from August 22, 1979, the date the district court entered judgment on liability, because liability was ultimately affirmed by the Court of Appeals, *see Bonjorno,* 752 F.2d 802. Relying on case law from other circuits, an article by Professor Curtis R. Reitz,[6] the equitable construction a court should give §1961, and Fed.R.App.P. 37, Bonjorno now argues that "an award of interest can properly pre-date the controlling judgment which vests the successful litigant's right to interest [and to collect a money judgment]." (Plaintiffs' brief at 27).

Kaiser, on the other hand, contends that interest accrues only from July 1, 1986, the date the Court of Appeals issued its certified judgment in lieu of a mandate, because only then was there a "final judgment" on liability *and* damages. Kaiser argues that on August 16, 1979, Columbia had an unliquidated liability verdict only and, even on August 22, 1979, Columbia did not

6. Reitz, *Interest on Judgments in Federal Litigation: 28 U.S.C. §1961* (October 1986) (unpublished). It is instructive to note that plaintiffs commissioned Professor Reitz to write his article for their use in support of their motion to award post-judgment interest. Professor Reitz cannot be considered an impartial expert or scholar in regard to this case. However, the court rejects his views as inapplicable not on that ground but on their inconsistency with case law and the equities of this case. Professor Reitz proposes a theory of statutory and case law interpretation under which interest accrues from the date judgment was entered on liability only, August 22, 1979, but plaintiffs' *right* to an award of interest under §1961 "vests" on the date of the "controlling judgment" (the date plaintiffs allege the Court of Appeals resolved all questions of liability and amount of damages recoverable, December 27, 1984). Applying Professor Reitz's thesis, which has not yet been adopted by any court, interest should be awarded from August 22, 1979, but at the rate in effect on December 27, 1984 under amended §1961(a) because plaintiffs' right to interest "vested" after October 1, 1982, the effective date of amended §1961(a).

have a final judgment remaining ultimately unchanged on its merits. Kaiser claims interest cannot accrue until the district court enters judgment after issuance of the mandate.

The relevant Third Circuit decision in determining from when post-judgment interest accrues if a lower court judgment is modified or reversed on appeal is *Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897 (3d Cir. 1985). In *Institutionalized Juveniles,* the district court issued an order awarding attorneys' fees under 42 U.S.C. §1988 on July 26, 1983. On appeal, the Court of Appeals vacated and remanded for recalculation of the fees. The court, in accordance with Fed.R.App.P. 37, directed the district court to allow post-judgment interest on the recalculated amount from the date the correct award would have been entered had the district court not erred. *Id.* at 927. The correct date was July 26, 1983, the date of the original district court order.

In *Institutionalized Juveniles,* 758 F.2d at 927, the Third Circuit "adopt[ed] the rule set out in" *Perkins v. Standard Oil Co. of California,* 487 F.2d 672 (9th Cir. 1973). The Ninth Circuit had reduced two awards of attorneys' fees and affirmed a third award. *Perkins v. Standard Oil Co. of California,* 474 F.2d 549 (9th Cir.), *cert. denied,* 412 U.S. 940 (1973). The issue before the court was post-judgment interest on the reduced awards. The *Perkins* court held that the reduction of awards was a partial affirmance of the district court judgment and that interest would run from the date the district court awarded the excessive fees. *Perkins,* 487 F.2d at 676. The court stated that, "interest should run from the date of entry of the original judgment because that is the date on which the correct judgment should have been entered." *Id.* Other appellate courts apply the *Perkins* approach. *See Buck v. Burton,* 768 F.2d 285 (8th Cir. 1985); *R.W.T. v. Dalton,* 712 F.2d 1225 (8th Cir.), *cert. denied,* 464 U.S. 1009 (1983) (cited with

approval in *Institutionalized Juveniles); Turner v. Japan Lines, Ltd.*, 702 F.2d 752 (9th Cir. 1983); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (in banc) (cited with approval in *Institutionalized Juveniles*). *Contra Harris v. Chicago Great Western Ry*, 197 F.2d 829 (7th Cir. 1952) (rejected by *Institutionalized Juveniles* at note 48). *Compare City of Detroit v. Grinnell Corp.*, 575 F.2d 1009 (2d Cir. 1977) (applying *Perkins* approach) *with Powers v. New York Central Railroad*, 251 F.2d 813 (2d Cir. 1958) (rejecting *Perkins* approach).

The *Perkins* court stated that there is no difference between the application of 28 U.S.C. §1961 and Fed.R.App.P. 37 to attorneys' fees award cases and other judgments modified or reversed on appeal. The Court of Appeals for the Third Circuit has not yet held that the *Institutionalized Juveniles* rule applies not only to attorneys' fee awards but also to modified or reversed judgments. However, it expressly adopted the "rule set out in *Perkins*," *Poleto*, 826 F.2d at 1281, so that it appears appropriate for this court to do so. It is also fair and equitable.

Had there been no error by this court, judgment on liability and damages would have been entered December 4, 1981. The August 16, 1979 verdict on liability alone was insufficient under Fed.R.Civ.P. 54(c) to allow or require the court to enter judgment, because the plaintiff, having been harmed, was entitled to money damages as relief. *Cf.* Fed.R.Civ.P. 54(c) ("[E]very final judgment *shall* grant the relief to which the party in whose favor it is rendered is entitled, ...) (emphasis added); 15 U.S.C. §15(a) (1987) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall* recover threefold the damages by him sustained, ...") (emphasis added). The court entered judgment on August 22, 1979 only after the jury returned verdicts as to liability *and* damages. Kaiser filed timely motions for a

new trial and for judgment notwithstanding the verdict; the court granted Kaiser's motion for a new trial on damages because Columbia offered insufficient evidence to support the jury verdict at the first trial on damages. The Court of Appeals upheld the grant of a new trial on damages. It was not until December 4, 1981, after the new trial on damages, that the court entered the judgment on damages trebled in the amount of $9,567,939. Although this court granted Kaiser's motion for judgment n.o.v. as to part of that damages verdict, the Court of Appeals reversed. It was the district court judgment of December 4, 1981 that the Court of Appeals reinstated and affirmed.

Therefore, the proper judgment for purposes of calculating post-judgment interest is this court's judgment of December 4, 1981. In *Poleto*, 826 F.2d at 1279-81, the Third Circuit held that post-judgment interest under §1961 is calculated from the date of the verdict underlying the appropriate judgment. Interest is awarded from December 2, 1981, the date of the jury verdict in the amount of $3,189,313, trebled to calculate the amount of judgment. The amount of the judgment was first determinable on that date. This result is consistent with the "purpose of post-judgment interest [, which] is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Id.* at 1280.

2. Interest Rate

Having determined that post-judgment interest accrues from December 2, 1981, the court must decide the appropriate rate of interest. Prior §1961 required that interest accrue "at the rate allowed by State law." Post-judgment interest was calculated at the rate established by the state in which the federal court sat; Pennsylvania's post-judgment interest rate was at all

relevant times 6% simple interest. *See* 42 Pa.C.S.A. §8101 (1982); 41 Pa.C.S.A. §202 (1987).[7]

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982, effective October 1, 1982, which amended §1961. Pub.L. No. 97-164, tit. III, pt.B, §302, 96 Stat. 25, 55-56 (1982) (codified in part at 28 U.C.S. §1961 (1982)). This act provided that varying state interest rates would no longer determine the interest rate on federal judgments. Instead, there would be a national interest rate that would be "equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment," 28 U.S.C. §1961(a) (1987) (hereinafter "the T-bill rate"), and further provided that interest "shall be compounded annually." 28 U.S.C. §1961(b) (1987). Congress did not amend the requirement that interest be calculated "from the date of the entry of the judgment," 28 U.S.C.A. §1961(a) (1987).

The issue presented is whether the amendments to §1961 apply to money judgments entered prior to October 1, 1982,[8] the effective date of the amendments. A

7. Title 42 Pa.C.S.A. §8101 (1982) provides:

> Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.

Title 41 Pa.C.S.A. §202 (1987) provides:

> Reference in any law or document enacted or executed heretofore or hereafter to "legal rate of interest" and reference in any document to an obligation to pay a sum of money "with interest" without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.

8. In their briefs, plaintiffs argue vigorously that the issue is not whether to apply amended §1961 "retroactively," but to determine the "retrospective intent of the amended statute." *See e.g.*, plaintiff's reply brief at p. 45. Regardless of the jargon used, the court must determine whether Pennsylvania's 6% simple interest rate or a T-bill rate of interest compounded annually accrues on a judgment entered December 4, 1981. For ease of discussion, the court will use the phrase "retroactive application."

Poleto determined that for purposes of §1961 the "date of the entry of the judgment" was the date of the underlying verdict. Because both the effective verdict and judgment in the instant action predated the effective date of the amendments to §1961, the court needed not decide whether the amendments apply when the verdict was reached before October 1, 1982 but the judgment thereon was entered after that date.

number of circuit courts have addressed this issue and reached differing results; the Third Circuit has not squarely addressed the issue. There are three principal interpretations: (1) amended §1961 applies only to a judgment entered after October 1, 1982 and post-judgment interest at the applicable state law rate accrues on a judgment entered before October 1, 1982 during the period *before* and *after* October 1, 1982; *see Brooks v. United States*, 757 F.2d 734, 741-43 (5th Cir. 1985); *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 746 F.2d 168 (2d Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943 (7th Cir. 1984) (per curiam); *United States v. Dollar Rent-A-Car Systems*, 712 F.2d 938, 940 n.5 (4th Cir. 1983); *United States ex rel. Billows Electric Supply Co. v. E.J.T. Construction Co.*, 557 F. Supp. 514 (E.D. Pa. 1983), *aff'd without opinion*, 729 F.2d 1450 (3d Cir. 1984); *Peterson v. Crown Financial Corp.*, 553 F. Supp. 114, 116-17 n.4 (E.D. Pa. 1982); (2) amended §1961 applies to a judgment entered before October 1, 1982 but affirmed thereafter; post-judgment interest at the T-bill rate accrues on the judgment during the period before and after October 1, 1982, *see R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir.), *cert. denied*, 464 U.S. 1009 (1983);[9] and (3) amended §1961 applies in part to a

9. In *Dalton*, the Eighth Circuit, in 1983, affirmed an attorneys' fee award of March 30, 1982 and allowed interest under

judgment entered before October 1, 1982; post-judgment interest on such judgment accrues at the state law rate until October 1, 1982 and at the T-bill rate after October 1, 1982, *see Campbell v. United States*, 809 F.2d 563 (9th Cir. 1987).[10]

Based on different legal theories, Bonjorno and Kaiser agree that the T-bill rate is the proper post-judgment interest rate and amended §1961 applies to this case. Bonjorno's argument depends on a difference between the date from which interest accrues and the date on which it is determined that it will accrue ("vesting date"). Bonjorno, relying on Professor Reitz's article, argues that although interest on the judgment should run from August 22, 1979, the right to post-judgment interest vested on December 27, 1984, the date the Court of Appeals affirmed a judgment of liability and damages against Kaiser. Bonjorno argues that interest begins accruing on August 22, 1979, at the T-bill rate in effect on December 27, 1984 when the right to

NOTES *(Continued)*

amended §1961 from that date. The only explanation for applying amended §1961 retroactively was because "it is the law [at the time of the affirmance] and should be used by the District Court." *Dalton*, 712 F.2d at 1235. Plaintiffs in *Dalton* were a class of juveniles who challenged the constitutionality of Missouri's practice of detaining juveniles without first holding a probable cause hearing. Unlike the instant private antitrust action, *Dalton* involved an issue of substantial public interest, so retroactive application of amended §1961 was appropriate. *See Bradley v. School Board*, 416 U.S. 696, 718-19 (school desegregation litigation renders substantial public benefit, unlike "mere private cases between individuals"); *infra* at pp. 15-16.

10. This court finds *Campbell*, 809 F.2d 563, inapposite to the case at bar. *See Id.* at 577-79 (Wiggins, J. dissenting). *Campbell* involved a unique factual situation (judgment entered after the enactment of amended §1961 but before its effective date). The *Campbell* court limited its holding to actions involving judgments against the United States, and acknowledged that the *Bradley* analysis might give a different result where private parties were involved.

post-judgment interest vested. The court finds this argument specious.

Kaiser, relying on *Litton*, 746 F.2d 168, contends that when interest begins to accrue before October 1, 1982, the prior version of §1961 applies to the entire period of post-judgment interest, but when interest begins to accrue after October 1, 1982, amended §1961 applies. Kaiser argues that the date from which interest accrues is July 1, 1986, so Kaiser agrees that the court should calculate interest at the T-bill rate, not from August 22, 1979 but from July 1, 1986, when the Court of Appeals certified the judgment in lieu of a formal mandate.

The court has rejected these theories on the "vesting date" in deciding that interest accrues from December 2, 1981. Therefore, the court must decide whether amended §1961 applies retroactively. "[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board*, 416 U.S. 696, 711 (1974). *Accord Campbell*, 809 F.2d at 569; *Brooks*, 757 F.2d at 741; *Litton*, 746 F.2d at 172.

Three factors are relevant in deciding whether manifest injustice will occur from retroactive application of amended §1961: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717.

Retroactive application here will result in manifest injustice. First, retroactive application of statutes is not favored where only private rights and private parties are involved. *See United States v. Schooner Peggy*, 4 U.S. (1 Cranch) 103, 110 (1801). The parties to this action are private parties; a civil antitrust action between private parties does not implicate "great national concerns" sufficient to justify retroactive application of amended §1961. *See Id.; See also supra* notes 9 and 10.

Second, a court will not "apply an intervening change [in law] to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that has matured or become unconditional." *Bradley*, 416 U.S. at 720. Kaiser had a right to rely on interest accruing at Pennsylvania's simple 6% rate. On March 15, 1985, two and one-half years after the effective date of amended §1961, Bonjorno stated to the Court of Appeals in the response to a motion for order staying issuance of the mandate:

> Interest is accruing on this judgment at a rate of only six percent, compared to substantially greater rates of money market interest. Section 1961(a) of Title 28 U.S.C., as amended in 1982, is apparently not retroactive to judgments, such as the 1981 judgment in the present case, entered prior to the effective date of the 1982 amendment. The continuing prejudice to the plaintiffs-appellants of a non-compensatory rate of interest, extending through the summer recess of the Supreme Court, is unfair.

Although this court has not considered Bonjorno estopped or bound by this representation, on this earlier occasion when seeking to influence action by the Court of Appeals in favor of plaintiffs, Bonjorno did represent to that Court that plaintiffs were entitled to interest only at the Pennsylvania legal rate both before and after October 1, 1982. This was then the common understanding of both parties and this court.

Third, a court will not apply a statute retroactively where the intervening change in law would impose an additional or unforeseeable obligation on a party without notice or an opportunity to be heard. *Id.* at 720. Central to this determination is whether Kaiser would have acted differently had it realized its new statutory obligation on October 1, 1982. *See Id.* at 721. The appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and

not for the purpose of delay to benefit from the higher commercial market rates of interest during the period the litigation was pending. But, Kaiser might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%. It would be manifestly unjust to Kaiser to apply amended §1961 by calculating interest at the higher T-bill rate as of October 1, 1982 or any time prior thereto when the amendments to §1961 did not become effective until October 1, 1982. *See Brooks*, 757 F.2d at 743; *Litton,* 746 F.2d at 175-76; *but see Campbell*, 809 F.2d at 575-76 (in action against United States, where judgment entered after enactment of amendment but before effective date, amended §1961 applied to period after effective date of amendment).

There is also statutory language and legislative history of the 1982 amendments suggesting that amended §1961 should be applied prospectively only. *Litton,* 746 F.2d at 174. *Accord Brooks*, 757 F.2d at 742. Amended §1961 did more than alter the post-judgment interest rate; it established a new method of computing an interest rate by averaging interest rates fifty-two weeks prior to the date judgment is entered; this statutory method is inextricably tied to the date of judgment and suggests application only to judgments entered after its passage.

The legislative history of the §1961 amendments suggests that Congress adopted a national post-judgment interest rate to insure that interest on federal judgments would be uniform and the interest rate would reflect the commercial interest rate at the time judgment is entered. The Court of Appeals has stated that the policy underlying awards of post-judgment interest under 28 U.S.C. §1961 is "compensation of the wronged party for loss of the use of money, in a changing economy where changes in the . . . statutory interest rate reflect changes in the value of

the use of money." *Devex,* 749 F.2d at 1024. By compensating for the loss of use of money at market interest rates Congress intended in part to eliminate the economic incentive for defendants to take frivolous appeals. S. Rep. No. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 1.

There is little guidance in the legislative history concerning application of these amendments to unpaid judgments entered prior to enactment. *See also Campbell*, 809 F.2d 563, 566 (reviewing the legislative history of the amendments to §1961). But, Congress did not provide that these amendments were effective immediately regardless of concern for successful plaintiffs who might continue to be deprived of T-bill rates of interest higher than legal interest. Instead, Congress specifically postponed the effective date for six months from passage on April 2, 1982 until October 1, 1982. Pub. L. No. 97-164, §402 (1982). There is at least a permissible inference that Congress did not intend interest at the T-bill rate to accrue on judgments entered before October 1, 1982, the effective date of the amending legislation. *See Litton,* 746 F.2d at 174; *Brooks,* 757 F.2d at 742; *cf. Campbell*, 809 F.2d at 574 (finding a "fair indication" that amended §1961 does not apply to judgments entered before the *enactment* date of the amendments, April 2, 1982).

It has been argued that even if amended §1961 does not apply to interest accruing on judgments entered before its effective date, the new interest calculations apply to any interest period thereafter. However, under both prior §1961 and amended §1961, once the judgment is entered interest is fixed as of that date and accrues at that same rate until the judgment is paid. The interest rate on judgments has been fixed not fluctuating both before and after the amendments to 28 U.S.C. §1961. The amending legislation contains no special rule for judgments entered before October 1, 1982 or between April 2 and October 1, 1982.

Our conclusion that amended §1961 is not retroactive is reinforced by the Court of Appeals' decision in *Devex,* 749 F.2d 1020, a patent infringement action, where the district court awarded damages in 1980. The Court of Appeals affirmed the damages judgment in 1981. In 1983, the district court, applying the prior version of §1961, awarded post-judgment interest at the interest rate under Delaware state law in 1980. The Court of Appeals affirmed without discussing possible retroactive application of amended §1961. *Id.* at 1023-24. Although it is not apparent from the decision whether the Court of Appeals considered the retroactivity issue, its decision implicitly held that amended §1961 does not apply to a judgment entered in a purely private action before the effective date of the amendments.

Decisions by other members of this court also support this determination. In *Peterson,* 553 F. Supp. at 116-17 n.4, Judge Pollak, reviewing the legislative history of amended §1961, concluded that "there is no indication that [amended §1961] was meant to have retroactive effect" and calculated the interest rate "as was mandated by §1961 as it stood on the date of entry of judgment." Similarly, in *Billows Electric Supply,* 557 F. Supp. at 516, Judge Broderick held that "the clear language as to the effective date of the Act compels the conclusion that the new market-based rates of postjudgment interest shall not apply to judgments entered prior to October 1, 1982." It would appear that courts in this Circuit have uniformly assumed the correctness of the holding herein that prior §1961 applies to judgments entered while it was in effect and amended §1961 applies to judgments entered on and after its effective date.[11]

Bonjorno is entitled to interest beginning December 2, 1981. Under the interest provision then effective,

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11. If the Court of Appeals determines that interest should accrue beginning July 1, 1986, a T-bill interest rate should apply.

post-judgment interest accrues at the Pennsylvania statutory rate of 6% simple interest. That rate did not change to any average T-bill rate on April 2, 1982 or on October 1, 1982. Having considered the *Bradley* factors, there is no cause for applying amended §1961 retroactively in general. ***But see supra*** notes 9 and 10. In this case, doing so would not comport with substantial justice.

3. Interest Sum

The court must next decide the amount of money on which interest accrued. Kaiser argues that the court should calculate interest on the single damage verdict of $3,189,313 awarded by the jury on December 2, 1981; Bonjorno contends that interest must accrue on the damages trebled, *i.e.*, $9,567,939, the amount of the money judgment reinstated and affirmed by the Court of Appeals. Whether post-judgment interest in a private antitrust suit accrues on single or treble damages has not been decided by the Court of Appeals for the Third Circuit.

There are three purposes for treble damages in private antitrust actions: deterrence, compensation, and punishment.

> It is true that antitrust treble damages were designed in part to punish past violations of the antitrust laws. But treble damages were also designed to deter future antitrust violations. Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. Treble damages 'make the remedy meaningful by counterbalancing the difficulty of maintaining a private suit' under the antitrust laws.

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) (citations omitted); *accord Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962-63 (3d Cir. 1983), *cert. denied*,

465 U.S. 1024 (1984). Treble damages under 15 U.S.C. §15 may also be "partially justifiable on compensatory grounds" because "an antitrust violation often involves numerous intangible economic harms." *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 and n.36 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

Interest is not usually awarded on penalties or punitive damages, because these damages are not intended to compensate a victim; interest on punitive damages is not necessary to compensate the plaintiff for the loss of the use of the amount awarded. *Cf. Devex*, 749 F.2d 1024-26 (denying an award of interest on unpaid post-judgment interest). But the Supreme Court has refused to classify treble damages solely as a "penalty" or "punitive." This court is bound by its determination that the primary purpose of treble damages under 15 U.S.C. §15 is to encourage private parties to enforce the antitrust laws and undertake difficult litigation. *Mechanical Engineers*, 456 U.S. at 575. Post-judgment interest on the trebled damages should not be denied because ***part*** of their purpose may be punitive.

There is nothing in the language or legislative history of §1961 supporting the denial of interest on trebled damages. Where a jury properly determines in a civil suit that a defendant is liable under the antitrust laws and awards damages, the court is required to treble the damages and enter judgment in the amount of the damages as trebled. 15 U.S.C. §15. Section 1961 provides for interest "on any money judgment," not just interest on actual damages or the amount of the verdict.

Although counsel have not directed the court to other cases specifically addressing this issue, other courts have awarded interest on trebled damages without explanation. *See, e.g., Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 845-47 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (awarding interest on

the trebled damages reduced on remittitur, not the actual damages jury awarded). Therefore, the court awards Bonjorno post-judgment 6% simple interest on the damages trebled in the amount of $9,567,939, with interest accruing from December 2, 1981.

4. Date Accrual of Interest Ends

The last issue before the court is whether post-judgment interest continued to accrue after July 3, 1986, when Kaiser paid Bonjorno the principal sum of $9,567,939. The United States rule provides that payments on judgments are applied first to accrued interest and then to principal, unless there is a "clearly expressed intention by the parties to handle allocation some other way." *Devex*, 749 F.2d at 1025.

Kaiser argues that the parties intended Kaiser's payment of the exact amount of the money judgment two days after the mandate issued to constitute full payment of the judgment not payment in part applied first to interest due. Bonjorno contends that the plaintiffs never intended to alter application of the United States rule. The court held an evidentiary hearing to determine the intent of the parties.

The court finds, based on the testimony including the demeanor of the witness, the exhibits, and the facts and circumstances of this case known to the court, that the parties, at or around the time payment was made, by their words and actions clearly expressed their intent to treat the July 3, 1986 payment as full payment of the outstanding principal.

After the Supreme Court denied Kaiser's petition for writ of certiorari, counsel for Bonjorno filed before the Court of Appeals on June 24, 1986, a "motion pursuant to Fed.R.App.P. 37 for inclusion in mandate of instructions regarding interest." In support of this motion, counsel for Bonjorno wrote "because plaintiffs have waited many years for payment of the principal damage

award in this case, there is no need to delay the payment of this judgment pending resolution of interest issues by this court." Plaintiffs' brief in support of motion at 11.

Counsel for the parties then negotiated a stipulation to allow this court to determine the post-judgment interest issues. The court finds credible the statement of counsel for Kaiser that plaintiffs' counsel agreed to enter this stipulation on the condition that Kaiser pay the full principal due as soon as possible after issuance of the mandate. If the parties had not agreed to the stipulation, Bonjorno would have had to wait for the Court of Appeals to decide the post-judgment interest issues, which would have delayed further issuance of the mandate and payment of the principal. The court also finds credible the representation of Kaiser's counsel that Kaiser agreed to the stipulation and paid $9,567,939 in order to stop the accrual of post-judgment interest. Plaintiffs did not offer in response any credible explanation why the parties entered the stipulation.

On June 27, 1987, counsel for plaintiffs sent Kaiser's counsel the proposed stipulation; in the cover letter, Bonjorno's counsel stated, "Please ask your client to wire funds in the amount of $9,567,939. . . . It is our position that interest is due from August 16, 1979 to the date of payment (June 30, 1986)." Defendants' Exhibit K-1.[12] The court agrees with defense counsel that this letter is additional evidence showing an agreement between the parties that Kaiser's $9,567,939 payment would satisfy the principal judgment and stop the accrual of post-judgment interest. The court also draws an inference of intent to apply the payment to principal first where the sum Bonjorno requested and Kaiser paid was equal to the original principal owed.

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12. Although Bonjorno expected to be paid the judgment on June 30, 1986, the mandate did not issue until July 1, 1986; Kaiser paid $9,567,939 on July 3, 1986.

In an attempt to rebut this evidence of the parties' clearly expressed intent to apply the July 3, 1986 payment to the principal, counsel for Bonjorno called as a witness one of its attorneys, Michael M. Baylson, Esquire. The court cannot credit Mr. Baylson's testimony that Bonjorno's attorneys were aware of, but intentionally failed to discuss, the *Devex* case and the United States rule in negotiating the stipulation with Kaiser, especially since it would have been unethical to intentionally allow Kaiser to misconstrue the effect of the stipulation.

The court rejects Mr. Baylson's explanation that his June 27, 1986 letter was intended only to inform Kaiser of plaintiffs' position on post-judgment interest issues; the plain language of the letter in the circumstances then obtaining shows an intent to apply the $9,567,939 payment to principal and to stop accrual of interest on the date Kaiser paid $9,567,939. The United States rule does not require the parties to mention the rule by name when expressing intent to allocate payments to principal not interest. The court finds clearly expressed a mutual intent to apply the July 3, 1986 payment to principal and not accrued interest.

Federal law also determines whether Bonjorno should be allowed interest on interest. *Devex,* 749 F.2d at 1024. Although not raised by the parties, the court expresses its opinion on this matter also in the hope of bringing this lengthy litigation to a close. In *Devex,* where the parties also agreed that payments applied to principal and changed the United States rule otherwise applicable, the Court of Appeals held that allowing interest on the post-judgment interest would amount to the illegal compounding of interest and should not be awarded. *Devex,* 749 F.2d at 1025.

To summarize, plaintiffs are entitled to post-judgment interest at 6% annual simple interest on a principal judgment of $9,567,939, accruing from December 2, 1981 to July 3, 1986. In the opinion of this

judge, based on the extended litigation before her, the law and all the equities, this is a fair and appropriate resolution of the issues delegated to this court by the Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. BONJORNO, GEORGE M. KERR and BARBARA K. CLISBY	:	CIVIL ACTION
v.	:	
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.	:	NO. 74-122

ORDER

AND NOW, this 11th day of April, 1987, upon consideration of plaintiffs' motion to award post-judgment interest, defendants answer to the motion, and plaintiffs' reply thereto, and following oral argument and an evidentiary hearing held thereon, it is ORDERED that the motion is GRANTED: defendants shall pay plaintiffs post-judgment interest in the amount of $2,632,886.30, calculated as follows: interest period (December 2, 1981 to July 3, 1986) = 4 years, 214 days
interest owed = ($9,567,939) × (6%) × (4+(214/365))
= $2,632,886.30

Norma L. Shapiro
J.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 27, 1982

MEMORANDUM

TO ALL: United States Judges
United States Magistrates
Circuit Executives
Clerks of Court
District Court Executives

SUBJECT: Post-Judgment Interest—
Our Memorandum of June 22, 1982

I. Effective Date

There have been several recent inquiries to this office as to the interest rate which should apply to judgments entered prior to October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (section 302(a), amending 28 U.S.C. § 1961). It is our view that the new rate will apply only to judgments entered on or after that date. The rate attaches as of the date of judgment and does not change thereafter unless the judgment is vacated or otherwise set aside.

II. Correction to Prior Memorandum

We have been advised that many small hand-held calculators will drop any digits more than two places to the right of the decimal point—thus giving different answers to the two equations contained in our June 22nd memorandum. Because the daily interest rate computed under equation #1 will be a very small number, it may be easier to use equation #2 on any

hand-size calculators. If you get different answers depending upon whether you use equation #1 or equation #2, the problem is in the calculator.

The difficulty of assuring accuracy in the calculation of interest is illustrated by errors on page 4 of our memorandum, in which the assumed interest rate in both equations was shown as 14.26 percent but should have read 14.62 percent. Please substitute the two attached pages for pages three and four of the June 22nd memorandum.

It seems advisable to emphasize again that in most cases the parties should be expected to perform the calculations of the applicable interest rate. This information is being provided so that judicial officers and employees can be responsive to questions on this issue.

Sincerely

Carl H. Imlay
General Counsel

Enclosures

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
September 23, 1988	October 20, 1988	8.04%
October 21, 1988	November 17, 1988	8.15%
November 18, 1988	December 15, 1988	8.55%
December 16, 1988	January 12, 1989	9.20%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
September 23, 1988	October 20, 1988	8.04%
October 21, 1988	November 17, 1988	8.15%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
January 16, 1987	February 12, 1987	5.75%
February 13, 1987	March 12, 1987	6.09%
March 13, 1987	April 9, 1987	6.04%
April 10, 1987	May 7, 1987	6.30%
May 8, 1987	May 11, 1987	6.30%
May 12, 1987	June 4, 1987	7.02%
June 5, 1987	July 2, 1987	7.00%
July 3, 1987	July 30, 1987	6.64%
July 30, 1987	August 4, 1987	6.64%
August 5, 1987	August 27, 1987	6.98%
August 28, 1987	September 1, 1987	6.98%
September 2, 1987	September 24, 1987	7.22%
September 25, 1987	September 30, 1987	7.22%
October 1, 1987	October 22, 1987	7.88%
October 23, 1987	November 19, 1987	6.90%
November 20, 1987	December 17, 1987	6.93%
December 18, 1987	January 14, 1988	7.22%
January 15, 1988	February 11, 1988	7.14%
February 12, 1988	March 10, 1988	6.59%
March 11, 1988	April 7, 1988	6.71%
April 8, 1988	May 5, 1988	7.01%
May 6, 1988	June 2, 1988	7.20%
June 3, 1988	June 30, 1988	7.59%
July 1, 1988	July 28, 1988	7.54%
July 29, 1988	August 25, 1988	7.95%
August 26, 1988	September 22, 1988	8.32%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
January 16, 1987	February 12, 1987	5.75%
February 13, 1987	March 12, 1987	6.09%
March 13, 1987	April 9, 1987	6.04%
April 10, 1987	May 7, 1987	6.30%
May 8, 1987	May 11, 1987	6.30%
May 12, 1987	June 4, 1987	7.02%
June 5, 1987	July 2, 1987	7.00%
July 3, 1987	July 30, 1987	6.64%
July 30, 1987	August 4, 1987	6.64%
August 5, 1987	August 27, 1987	6.98%
August 28, 1987	September 1, 1987	6.98%
September 2, 1987	September 24, 1987	7.22%
September 25, 1987	September 30, 1987	7.22%
October 1, 1987	October 22, 1987	7.88%
October 23, 1987	November 19, 1987	6.90%
November 20, 1987	December 17, 1987	6.93%
December 18, 1987	January 14, 1988	7.22%
January 15, 1988	February 11, 1988	7.14%
February 12, 1988	March 10, 1988	6.59%
March 11, 1988	April 7, 1988	6.71%
April 8, 1988	May 5, 1988	7.01%
May 6, 1988	June 2, 1988	7.20%
June 3, 1988	June 30, 1988	7.59%
July 1, 1988	July 28, 1988	7.54%
July 29, 1988	August 25, 1988	7.95%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
July 3, 1985	July 9, 1985	7.70%
July 10, 1985	August 1, 1985	7.60%
August 2, 1985	August 29, 1985	8.18%
August 30, 1985	September 26, 1985	7.91%
September 27, 1985	October 24, 1985	7.87%
October 25, 1985	November 21, 1985	8.08%
November 22, 1985	November 26, 1985	8.08%
November 27, 1985	December 19, 1985	7.87%
December 20, 1985	January 16, 1986	7.57%
January 17, 1986	February 13, 1986	7.85%
February 14, 1986	March 13, 1986	7.71%
March 14, 1986	April 10, 1986	7.06%
April 11, 1986	May 8, 1986	6.31%
May 9, 1986	May 13, 1986	6.31%
May 14, 1986	June 5, 1986	6.56%
June 6, 1986	July 3, 1986	7.03%
July 4, 1986	July 8, 1986	7.03%
July 9, 1986	July 31, 1986	6.35%
August 1, 1986	August 28, 1986	6.18%
August 29, 1986	September 25, 1986	5.63%
September 26, 1986	October 23, 1986	5.79%
October 24, 1986	November 20, 1986	5.75%
November 21, 1986	December 18, 1986	5.77%
December 18, 1986	December 23, 1986	5.77%
December 24, 1986	January 15, 1987	5.93%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
November 25, 1983	December 22, 1983	9.93%
December 23, 1983	January 19, 1984	10.10%
January 20, 1984	February 16, 1984	9.87%
February 17, 1984	March 15, 1984	10.11%
March 16, 1984	April 12, 1984	10.60%
April 13, 1984	May 10, 1984	10.81%
May 11, 1984	May 15, 1984	10.81%
May 16, 1984	June 7, 1984	11.74%
June 8, 1984	July 5, 1984	12.08%
July 6, 1984	July 10, 1984	12.08%
July 11, 1984	August 2, 1984	12.17%
August 3, 1984	August 30, 1984	11.93%
August 31, 1984	September 27, 1984	11.98%
September 28, 1984	October 25, 1984	11.36%
October 26, 1984	November 21, 1984	10.33%
November 22, 1984	November 27, 1984	10.33%
November 28, 1984	December 20, 1984	9.50%
December 21, 1984	January 17, 1985	9.08%
January 18, 1985	February 14, 1985	9.09%
February 15, 1985	March 14, 1985	9.17%
March 15, 1985	April 11, 1985	10.08%
April 12, 1985	May 9, 1985	9.15%
May 10, 1985	May 14, 1985	9.15%
May 15, 1985	June 6, 1985	8.57%
June 7, 1985	July 3, 1985	7.70%

FEDERAL COURTS IMPROVEMENT ACT OF 1982

Post-Judgment Interest Rate (Cont'd)

From	To	Rate
October 1, 1982	October 28, 1982	10.41%
October 29	November 25	9.29%
November 26	December 23	9.07%
December 24, 1982	January 20, 1983	8.75%
January 21	February 17	8.65%
February 18	March 17	8.99%
March 18	April 14	9.16%
April 15	May 12	8.98%
May 13	June 9	8.72%
June 10	July 7	9.59%
July 8	August 4	10.25%
August 5	August 9	10.25%
August 10	September 1	10.74%
September 2	September 29	10.58%
September 30	October 27	9.98%

NEW RATES NOT COVERED ABOVE MAY BE OBTAINED BY TELEPHONING THE OFFICE OF ACCOUNTING SYSTEMS AND PLANNING, FTS 633-6276, FOR THE INFORMATION. ALTERNATIVELY, YOU MAY CALL THE TREASURY DEPARTMENT'S RECORDED MESSAGE REPORTING THE RESULTS OF THE MOST RECENT AUCTIONS OF 13, 26, AND 52-WEEK TREASURY BILLS. THAT RECORDING IS REACHED BY CALLING (202) 287-4100, IN THE BUREAU OF THE PUBLIC DEBT. THIS INFORMATION IS AVAILABLE BEGINNING THE DAY AFTER THE AUCTION.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

July 18, 1984

Mr. Roger A. Britt
Gray, Cary, Ames & Fry
525 H Street, Suite 2100
San Diego, California 97101

Dear Mr. Britt:

I am writing in response to your June 19, 1984, letter to Mr. Dewey Heising regarding the establishment of post-judgment interest rates on Federal judgments established by 28 U.S.C. §1961. Your letter was directed to me by Mr. Heising's office for reply.

You specifically requested a reconciliation of the difference between the issue/settlement dates cited by the Bureau of Public Debt and the beginning or ending dates of the interest intervals set by the Administrative Office.

The reason for the difference is relatively simple. The Administrative Office has consistently taken the position, since the implementation of 28 U.S.C. §1961, *as amended* by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, that the relevant interest rate is "settled" on the auction date, and that such interest rate is applicable to judgments entered on the next day following the auction, until the next interest rate is "settled." The common definition of the term "settle," as utilized by the Administrative Office, is in contradistinction to the technical definition, which involves the "settlement" of accepted tenders, on or before a date set by the Secretary of the Treasury. The "settlement date" in press releases of the Treasury Department is usually, but not always, the last day upon which payment for accepted bids at the auctions for T-bills can be made, and usually coincides with the issue date.

The Administrative Office sets the dates in question on the day following the auction for reasons of administrative necessity. The Treasury Department regulations provide (31 C.F.R. §349.8) that payment must accompany tenders, except for banks and recognized dealers. These entities have until the date specified in the offering to make settlement on their accepted tenders (31 C.F.R. §349.12, payment of accepted tenders). It also appears from the Treasury materials available (copies of Treasury offerings, instructions to bidders, statutes and the regulations) that the bills will be issued on a specific date, and that "settlement" must only be completed by that date (or another, different date specified in the offering circular). The only truly fixed dates appear to be those for the auction and those for the issuance.

Taking all of the facts into consideration, it is apparent that if the Administrative Office were to adopt a "settlement date" as the date on which the new rate would actually take effect, there would be serious and immediate questions as to the proper date. Would it be the date the cash payers pay up? Or, would it be the issue date? If one Federal Reserve Bank were to settle on a different date, would that change the effective date for the district in which it was located, or for all the districts in the large geographical area served by the Bank? Uniform administration of the statute requires that in order to serve the purpose of establishing a uniform national rate, there be one date, nationwide.

This interpretation of the statute is in accord with the common meaning of the term "settlement" (to agree, to approve, to ascertain, to determine, to establish, to fix), and renders the statute fair and sensible in its operation, in accordance with well-established rules of construction. *See* Sutherland, Statutory Construction, §47.31. In essence, we have chosen to interpret the statute in accordance with the ordinary meaning of the

word "settlement," as such renders the statute workable and provides uniformity.

I trust that this information is sufficient to resolve your dilemma.

Sincerely,

Timothy J. Greszko
Assistant General Counsel

cc: Mr. Heising

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

September 15, 1982

Mr. Edward H. Funston
Assistant Director, Executive Office
for United States Attorneys
Suite 803
1 Skyline Place
5205 Leesburg Pike
Falls Church, Virginia 22041

Dear Mr. Funston:

The question was recently raised with your office, as well as this office, as to the date upon which the interest rate on fifty-two week Treasury bills would be effective as to judgments filed in the district courts, under the provisions of section 302 of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164). The suggestion has been made that the wording of that section requires that the interest rate settled at the auction not be effective until a later "settlement" date. The operative wording of that section is as follows: (Emphasis added.) "[A]t a *rate* equal to the coupon issue yield equivalent . . . of the average accepted auction *price* for the last *auction* of fifty-two week United States Treasury bills *settled* immediately prior to the date of judgment."

It is my conclusion that the interest rate established at the auction takes effect with respect to judgments entered after the auction, not at some later time. It appears that the possibility of ambiguity arises from the use of the term "Settlement date" in press releases of the Treasury Department, which is usually, but not always, the last day upon which payment for accepted bids at the auctions for the T-bills can be made, and usually coincides with the issue date. (The most recent press release notes that settlement at the California Federal Reserve

Bank and branch will be September 10, rather than September 9, which is the issue date.)

The Treasury Department regulations provide (31 C.F.R. §349.8) that payment must accompany tenders, except for banks and recognized dealers. These entities have until the date specified in the offering to make settlement on their accepted tenders (31 C.F.R. §349.12, Payment of accepted tenders). It also appears from the Treasury materials available (copies of Treasury offerings, instructions to bidders, statutes and the regulations) that the bills will be issued on a specific date, and that "settlement" must only be completed by that date (or another, different date specified in the offering circular). The only truly fixed dates appear to be those for the auction and for the issuance.

Unfortunately, there is no legislative history on this aspect of the Act. The language used was a last-minute creation. Thus, we have had to look more to the meaning of the words than to a legislative intent. However, I consider it significant that in enacting this legislation Congress, which could have used the much more precise term "issued" did not do. Accordingly, the word "settled," should be understood in its common meaning. In the new language of §1961, its real antecedents are the words "rate" and "price" which are clearly "settled" at the auction. Payments then may occur on that day, for those who have tendered cash, or the equivalent, or within a specified time. It is only human nature that causes all those permitted to delay their payments to wait until the last possible day.

As pointed out in Black's Law Dictionary (5th Ed., 1979), the word "settle" is "A word of equivocal meaning; meaning different things in different connections, and the particular sense in which it is used may be explained by the context or the surrounding circumstances. Accordingly, the term may be employed as meaning to agree, to approve, to arrange, to ascertain, to

liquidate, to come to or reach an agreement, to determine, to establish, to fix, to free from uncertainty, to place, or to regulate.

Parties are said to *settle* an account when they go over its terms and ascertain and agree upon the balance due one from the other. And, when the party indebted pays such balance, he is also said to settle it." The Uniform Commercial Code, §4-104(j) defines settle to mean make payment. Even the most cursory examination of the definitions given under the heading of "Settle" or "Settlement" in the most recent edition of *Words and Phrases* indicates that it is simply not possible to fix an absolute meaning to that word. Not only does it have a variable legal meaning, but its common, technical, and commercial meanings all differ, depending upon the context. In such a circumstance, Sutherland, Statutory Construction, §47.31 notes that where different meanings exist, the common meaning will prevail until another is proven. In view of the slippery nature of the term "settled" in all of these categories, the language of section 302 must be construed in such a manner as to render the statute fair and sensible in its operation, in accordance with well-established rules of construction.[1]

If we were to adopt a "settlement date" as the date on which the new rate would take effect, there would be serious and immediate questions as to the proper date. Would it be the date the cash payers pay up? Or would it be the issue date? If one Federal Reserve Bank were to "settle" on a different date, would that change the effective date for the district in which it was located, or for all the districts in the large geographical area served by the Bank? Uniform administration of the statute requires that in order to serve the purpose of establishing a uniform national rate, there be one date, nationwide.

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1. 82 C.J.S. §322(b)(3), §323, §326, and §329(d).

If we were to select the issue date as the proper effective date, the implications of having a delay in imposing the new rate on judgments must be considered. With as much as a week to consider the matter, parties would have an enormous incentive to file delaying motions if the resulting delay would be advantageous to their position. Also, judges and clerks of court would be subject to accusations of unfair or even corrupt dealing when issue dates and judgments were close in time. The disastrous results this could have on the administration of justice are obvious and cannot be overlooked.

At one time, under 12 C.F.R. §1204.104, banks were authorized to issue their certificates of deposit whose rates were tied to 26-week T-bill rates only on or after the "issue" dates. This gave investors and depositors two full business days under the old rates, during which they, of course, could decide to take advantage of that rate, or wait until the next rate took effect. Those regulations were changed so that the auction results are now effective on the following day for the purpose of determining the banks' rate. Rates for the All-Savers certificates take effect on the Monday after the auction, not on the subsequent Thursday. That feature has, we note, led to some savings institutions remaining open for extra hours to allow depositors to take advantage of the disappearing higher rate. Thus, it appears that there is no uniform practice of tying the effective date of an interest rate to the "issue date." Indeed, there are substantial reasons not to do so.

While, or course, our opinion on this question is subject to revision in a case before the courts, we shall be advising the judges and courts on the basis of the foregoing views. If the auction scheduled for September 30, 1982, is indeed held, the rate settled at that auction will apply to cases decided on and after October 1, 1982.

Sincerely,

Carl H. Imlay
General Counsel

bcc: Joe Torpey

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 88-1318 & 88-1396

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,
Appellants No. 88-1318

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.

BONJORNO, JOSEPH A., KERR, GEORGE M., and CLISBY, BARBARA K., as Transferees in Liquidation and Dissolution of Columbia Metal Culvert Co., Inc.,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.
Appellants No. 8-1396

AMENDED ORDER

BEFORE: STAPLETON, SCIRICA, and COWEN,
Circuit Judges

The Court's Order filed February 13, 1989, is hereby amended and supplemented as follows:

The Court being of the view that the issue raised should be determined by the district court in the first instance, the Petition for Inclusion of Instructions in the Mandate is denied.

By the Court,

Circuit Judge

Dated: February 21, 1989